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Will the Punishment Fit the Victims? The Case for Pre-Trial Disclosure, and the Uncharted Future of Victim Impact Information in Capital Jury Sentencing

José F. Anderson
University of Baltimore School of Law, janderson@ubalt.edu

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WILL THE PUNISHMENT FIT THE VICTIMS? THE CASE FOR PRE-TRIAL DISCLOSURE, AND THE UNCHARTED FUTURE OF VICTIM IMPACT INFORMATION IN CAPITAL JURY SENTENCING©

*José Felipé Anderson**

—Men regard it as their right to return evil for evil—and, if they cannot, feel they have lost their liberty.

Aristotle
Nicomachean Ethics (4th C.B.C.)

—To return violence for violence does nothing but intensify the existence of violence and evil in the universe. Someone must have sense enough to cut off the chains of violence and hate.

Martin Luther King, Jr.
"Advice for Living" (1958)

I. INTRODUCTION

The United States Supreme Court decision in *Payne v. Tennessee*,[1] upholding the use of victim impact statements[2] in capital jury sentencing

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* Assistant Professor of Law, University of Baltimore School of Law; B.A., University of Maryland Baltimore County 1981; J.D. University of Maryland School of Law 1984.

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1. 501 U.S. 808 (1991).

proceedings, marked one of the most dramatic reversals of a precedent in the history of United States constitutional jurisprudence. The decision in *Payne* expressly overruled *Booth v. Maryland*[3] decided only four years earlier. The *Booth* case rejected the use of victim impact statements in capital sentencing cases that involved juries. In *Payne*, the Supreme Court made it clear that victims were entitled to offer, and juries were permitted to consider, the effect that a "death eligible" homicide had on surviving relatives, even if the defendant was unaware of the impact he would cause at the time of the crime.[4]

The understandable desire of surviving relatives to participate in the criminal justice process, coupled with the perceived lack of balance which is said to occur when the victim is not permitted to address the jury, while members of the defendant's family are permitted to plead for the life of the defendant, contributed to the Court's abrupt departure from its earlier doctrine. In departing from *Booth*, however, the Supreme Court created a potential for uncertainty and confusion in capital jury sentencing that is likely to effect decisions by trial courts, prosecutors and defense attorneys for years to come. This article is an attempt to examine what has occurred in the Supreme Court regarding victim impact information.[5] It will also explore

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2. Although the Supreme Court and various statutory formulations refer to the victim related material as "victim impact statements," *see Payne*, 501 U.S. at 821, at times during this article I have characterized the subject matter as "victim impact information." In my view, the term "victim impact statement" is underinclusive and misleading since it does not convey the full range of the material that a capital sentencing jury may be permitted to consider under the *Payne* decision.

3. 482 U.S. 496 (1987). *Booth* held by a 5-4 vote that victim impact statements were unconstitutional in capital jury sentencing under the Eighth and Fourteenth Amendments of the United States' Constitution. *Id.* The *Booth* holding was also expressly reaffirmed in *South Carolina v. Gathers*, 490 U.S. 805 (1989), in another 5-4 decision.

4. *Payne*, 501 U.S. at 80.

5. This article is primarily concerned with the problem victim impact information poses in capital sentencing where juries are playing a role in either imposing or recommending a sentence of death. Juries and jurors present special problems for the use of such information that are not as prevalent when a trial judge is considering a capital sentence.

There is no constitutional requirement that a sentencing hearing in a capital case be conducted before a jury. *See* Harris v. Alabama, 115 S. Ct. 1031 (1995). In at least seven states the judge alone makes the determination as to sentence in capital cases. Alabama, *see* ALA. CODE § 13A-5-47 (1994 & Supp. 1996), Arizona, *see* ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1996), Idaho, *see* IDAHO CODE § 19-2515 (Supp. 1996), Montana, *see* MONT. CODE ANN. § 46-18-301 (1995), Nebraska, *see* NEB. REV. STAT. § 29-2522 (R.S. Supp. 1995). In contrast, Florida, *see* FLA. STAT. ANN. § 921.141 (West 1996), and Indiana, *see* IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1996), provide for the jury to make a non-binding recommendation to the judge. But "most states provide for a unitary capital trial in which the

what the future holds for courts attempting to set boundaries on the sentencing jury's consideration of such information. Finally, I will suggest some procedural safeguards that federal and state courts or legislatures concerned with capital cases should consider as they determine when it is appropriate to make this type of information part of its capital sentencing scheme.

The Supreme Court has expressed its concern that a capital sentencing process should "facilitate the responsible and reliable exercise of sentencing discretion."[6] It has ruled that certain procedural safeguards must be put in place to make the procedure constitutional. However, by removing the bright line prohibition against victim impact information that the Supreme Court previously announced in *Booth*, it has allowed a potentially volatile category of evidence into capital cases without carefully explaining how it should be considered by a sentencing jury. State and federal law remains unclear as to

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jury adjudicate[s] guilt and punishment in a single proceeding." WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF MODERN SYSTEMS OF CAPITAL PUNISHMENT 73 (1991).

Although when *Booth* was first decided the Supreme Court did not expressly comment on whether its holding applied to capital judge sentencing, most federal and state courts had no trouble in distinguishing *Booth* and limiting its reach to capital jury cases. *See, e.g.*, Evans v. State, 563 N.E.2d 1251, 1263 (Ind. 1990); State v. McMillin, 783 S.W.2d 82, 96 (Mo. 1990) (distinguishing between victim impact testimony in judge and jury sentencing); Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) (*Booth* exclusion not applicable to death sentence based on jury's recommendation and not jury verdict); Tibbs v. State, 528 A.2d 510, 519 n.6 (Md. App. 1987) (holding that in a non-capital murder case, where victim's father gave evidence of both the impact of the crime on the family and made a recommendation of what he believed an appropriate sentence, neither circumstance constituted error).

6. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985). In *Caldwell*, the Supreme Court acknowledged that "[a] capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." *Id.* at 333.

The view that a jury should fix criminal punishment in many types of cases has existed in this country since the early 20th century. STAT. OF ARK. (Crawford & Moses 1921), ch. 44, § 3203; 3 ILL. COMP. STAT. ANN. (Callaghan 1924); CODE OF VA. § 4784 (1919), VA. CODE § 4784 (Michie 1936) ("The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law.") (*cited in* Note, *Should the Jury Fix the Punishment for Crimes?*, 24 VA. L. REV. 462, 463-64 (1937)). Such statutes were criticized at the time they were in effect, *see* Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1306-07 (1937); Charles Kerr, *A Needed Reform in Criminal Procedure*, 6 KY. L.J. 107, 108 (1918), primarily because juries lack experience in determining what degree of punishment is appropriate.

how victim impact evidence is relevant to establish statutorily relevant aggravating circumstances or how it should be considered as a sentencing factor.

Not only do uncertainties exist that concern the relevance of such information, but consideration of the confrontation[7] problems presented by victim impact evidence have been largely unaddressed by the courts. Furthermore, legitimate questions arise regarding whether a defendant is entitled to any pre-trial disclosure of who the victims are, what they intend to present and how they intend to present their stories. This article advances the proposition that disclosure of victim impact information should be available at least in time for a capital defendant to consider his election of either a judge or a jury sentencing, where an election of the sentencer is available.

I will first examine the short but turbulent reign of *Booth*'s per se ban of victim impact information and *Payne*'s dramatic and controversial reversal of *Booth*. Secondly, I will examine the history of victim participation in sentencing and the rise and influence of the modern "victims rights" movement on sentencing in general and capital sentencing in particular. Thirdly, I will examine the major criticisms of the use of victim impact information in capital sentencing, focusing particularly on the racial disparity that is likely to occur when the emphasis on capital sentencing is focused on the victim. Finally, I will offer some suggestions to improve the fairness in the use of victim impact information in capital cases for both defendants and victims. Hopefully, I will demonstrate why disclosure of victim impact evidence early in the capital case should be adopted as a threshold procedural safeguard if capital sentencing is to retain any integrity at all.

The seriousness of capital jury sentencing, and the recognition that victim impact information is going to be a part of such sentencing in the foreseeable future, requires that serious attention be given to those matters left unaddressed by the Supreme Court. Lower courts will be required to resolve such concerns generated by the Supreme Court's recent pronouncement on victim impact information in *Payne* and the uncharted course set by that precedent. It is certain that any court involved in the process of administering the death penalty must confront the difficult and recurring issues which are generated when a capital sentencing jury is asked to consider "victim impact" in the calculus of its "life or death decision."

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7. In neither *Booth* nor *Payne* was the Sixth Amendment confrontation provision discussed in any detail, but the elusive character of victim impact information raises serious questions about how, if at all, it can be rebutted.

II. THE RISE AND RUIN OF *BOOTH V. MARYLAND*: "RETHINKING THE EVOLVING STANDARDS OF DECENCY"

On June 15, 1987, Justice Lewis F. Powell, writing for a slim five justice majority, announced the first "bright line" exclusion of a category of evidence used by the prosecution in capital sentencing. *Booth v. Maryland*[8] held that the introduction of a victim impact statement "at the sentencing phase of a capital murder trial violates the Eighth Amendment . . . ."[9] The *Booth* case involved the killing of an elderly West Baltimore couple, 78-year-old Irvin and 75-year-old Rose Bronstein.[10] John Booth, a neighbor of the Bronsteins, along with an accomplice, Willie Reid, entered the victim's home, apparently for the purpose of stealing money to buy drugs.[11] After being bound and gagged, the victims were killed by repeated stab wounds in the chest with a kitchen knife. The Bronsteins were not discovered until two days later by their son.[12] The jury found Booth guilty of two counts of first degree murder, two counts of robbery and two counts of conspiracy to commit robbery.[13] The prosecution sought the death penalty and Booth elected to have his sentence determined by a jury instead of a judge.[14]

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8. 482 U.S. 496 (1987). Prior to the *Booth* case, several state courts had addressed the question of the admissibility of victim impact testimony and concluded that it should not be admitted. *See, e.g.*, Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987) (en banc) (testimony of victim's father regarding victim's character not proper rebuttal); Patterson v. State, 513 So. 2d 1263 (Fla. 1987) (victim impact and views of survivors not proper aggravation); Jones v. State, 738 P.2d 525 (Okla. Crim. App. 1987) (photos of victims inadmissible); Parker v. State, 731 S.W.2d 756 (Ark. 1987) (victim's photos inadmissible); State v. Hope, 508 N.E.2d 202 (Ill. 1986) (evidence and argument regarding victim's life required reversal); People v. Levitt, 156 Cal. App. 3d 500 (1984) (bereavement of victim's family not proper factor for non-capital sentencing).

9. *Booth*, 482 U.S. at 509. Although the Supreme Court had never rendered an opinion excluding the admission of evidence under the Eighth Amendment prior to *Booth*, it had ruled, on a number of occasions that certain evidence could not be excluded if offered on behalf of a capital defendant. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Supreme Court invalidated an Ohio statute which precluded a capital defendant from introducing evidence intended to relate to his character and background. The case was followed by *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Skipper v. South Carolina*, 476 U.S. 1 (1986). In *Eddings*, the court required that testimony of child neglect and abuse by the defendant's father be introduced. *Skipper* permitted a capital defendant to admit evidence of his "well behaved and peaceful adjustment to prison life."

10. *Booth*, 482 U.S. at 497.

11. *Id.* at 497-498.

12. *Id.* at 498.

13. *Id.*

14. *Id.* (citing MD. ANN. CODE art. 27, § 413(b) (1982)). Pursuant to Maryland law the

At the sentencing phase, the state offered into evidence a pre-sentence investigation report which included evidence of the effect of the crime on members of the Bronstein family.[15] In Maryland, at the time Booth was tried, state law required that a victim impact statement be supplied as part of the pre-sentence investigation.[16] The relevant Maryland law specifically listed the information required to be collected and presented to the sentencing jury.[17]

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capital defendant is to be sentenced following the guilty verdict "as soon as practicable." In most cases this means the sentencing would occur immediately following the trial, often the very next day. Under the statute the defendant would be permitted to waive the right to a jury and be sentenced by the judge. States vary as to what sentencing options it offers the capital defendant. *See supra* note 5. Nevertheless, the overwhelming preference for the option of a jury sentencing supports the notion that a jury decision as to the appropriate sentence in a capital case reflects the sentiment that the decision will represent the collective conscience of the community. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (Stewart, J., concurring). Thus, the defendant, in most jurisdictions, is at least offered the choice between the judge, a decision-making professional, or the members of the public. "Two thirds of the states with capital statutes and the federal government accord the jury final sentencing power." Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9 (1994). The popularity of jury trial provision in capital cases reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

15. *Booth*, 482 U.S. at 500. Victim impact statements are often part of a pre-sentence investigation report or contain some information that would ordinarily be contained in such reports. It has been suggested that such reports are "the single most important document at both the sentencing and correctional levels of the criminal process." Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615, 1623 (1980).

16. *Id.* at 492 (citing MD. CODE ANN. art. 41, § 4-609(d) (1986)). In 1983, the Maryland General Assembly amended the VIS provision to provide that:

> In any case in which the death penalty . . . is requested . . . a presentence investigation, including a victim impact statement . . . shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted . . . .

§ 4-609(d) (1992).

17. *Booth*, 482 U.S. at 498 (citing MD. CODE ANN. art. 41, § 4-609(c) (1986)). Specifically, the report shall:

> (i) Identify the victim of the offense;
>
> (ii) Itemize any economic loss suffered by the victim as a result of the offense;
>
> (iii)Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
>
> (iv)Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
>
> (v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

Interviews with the family by probation officials were the primary source of materials supplied in the report.[18] The material collected from the family included interviews with the victims' son, daughter, son-in-law, and granddaughter.[19] After some discussion between court and counsel, it was decided that the prosecutor would read the statement to the jury, rather than have family members testify before the jury.[20] Defense counsel objected to the admission of the statement as both "irrelevant and unduly inflammatory, and that therefore its use . . . violated the Eighth Amendment of the Federal Constitution."[21]

The information read to the sentencing jury included a list of the victims' surviving family members, including grandchildren, and reports of how family members felt when they first heard about the tragedy. The statement permitted the family to relate their religious tradition, to recall past family events with their slain relatives, and to tell the jury about the many people who attended the funeral.[22]

In striking down the admission of the statement, the majority of the Supreme Court relied on the joint opinion in *Gregg v. Georgia*[23] authored by Justices Stewart, Powell and Stevens. That opinion cautioned that a sentencing jury's discretion to impose a death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[24] After noting that the victim impact evidence admitted in the *Booth* case was of two varieties: first, information involving personal characteristics of the victim and emotional impact of the crime, and second,

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(vi) Contain any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.

§ 4-609(c)(3).

18. *Booth*, 482 U.S. at 499.

19. *Id.*

20. *Id.* at 501. It has been suggested that the written victim impact statement read to the jury is not as troublesome for a defendant as the victim's oral testimony. *See also infra* note 200.

21. *Id.* at 500-501.

22. *Id.* at 509-515. The appendix to the opinion of the court contains the entire victim impact statement read to Booth's sentencing jury. It presents a clear picture of the almost limitless range of information that the trial judge considered from family members.

At oral argument before the Supreme Court, George E. Burns, Jr., counsel for Booth, suggested that victim impact testimony in a capital case *would be* similar to executing a defendant based on the results of a public opinion poll. "An '800 number' linked to the courtroom would achieve the same purpose as a victim impact statement." 4 CRIM. L. RPT. 4013 (BNA 1987) (reprinting argument of *Booth v. Maryland* on April 15, 1987).

23. 428 U.S. 153 (1976).

24. *Booth*, 482 U.S. at 502 (quoting *Gregg*, 428 U.S. at 189).

relating to the family members' opinions about the appropriate sentence, the court concluded that neither category of information was relevant to the capital sentencing decision.[25]

The Court held that the admission of the evidence created for Booth "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner."[26] In excluding the evidence, the Court rejected the argument that the personal loss of the family members should be considered a "circumstance" of the crime.[27] The Court expressed concern that the defendant might be punished as a result of consequences he could not have been aware of at the time he selected his victim.[28] The Court

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25. *Id.* at 502.

26. *Id.* at 503. The Court's focus on avoiding arbitrary and capricious capital sentences was not surprising. In the absence of precedent excluding a category of information from the traditionally broad discretion afforded judges in sentencing, *see* Williams v. New York, 337 U.S. 241, 244-45 (1949) (recognizing that sentencing judges have wide discretion as to the sources and types of information to consider at sentencing), the Court needed a basis for limiting what jurors could take into account. The Court had little choice other than to rely on the broad "arbitrary and capricious" doctrine it had developed in its post-1972 jurisprudence. *See e.g.*, Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring). The Supreme Court's decision in *Furman*, which produced multiple sets of concurring opinions critical of the manner in which the death penalty was being administered at that time, provided the basis for relief when the Court believed state punishment schemes were unfairly administered. *Id.*

The principal theme on which consensus could be reached in *Furman* was that even if the punishment could, in theory, be constitutionally applied, the unguided, standardless, discretion resulted in unfair and inconsistent results. Citing the Eighth Amendment's cruel and unusual punishment proscriptions, one justice described the process in place across the country at the time as arbitrary as being "struck by lightening." *Id.* at 309 (Stewart, J. concurring). Capital punishment statutes were thereafter required to provide guidance for the jury with adequate procedural safeguards. The Court spelled out some of those safeguards in a set of opinions issued on the same day in 1976 which authorized statutes that included (1) a two-part trial where the guilt/innocence determination is separated from the sentencing determination (bifurcation); (2) a specific list of aggravating and mitigating circumstances to limit the jury's discretion; and (3) automatic appellate review. *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

27. *Booth*, 482 U.S. at 502-03.

28. *Id.* at 504. A fundamental debate which undergirds the question of what sentencing criteria are appropriate to consider involves the determination of what circumstances society intends to punish. Simply stated, is a person punished for his or her actions and intentions or should the punishment also reflect the full scope of the harm caused by the offender? This question is not unique to capital punishment or criminal law. The classic debate over the appropriate scope of punishment for offenders involved in homicide prosecutions under both the common law and statutory felony murder doctrine provides rich examples of the problematic policy concerns encountered when courts attempt to draw the line. *See generally*

was also particularly "troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy."[29]

The Court also pointed out several potential problems encountered by the defendant attempting to rebut such evidence, noting, among other things, the "strategic risks of attacking the victim's character before the jury."[30] In two separate opinions, Justice White and Justice Scalia dissented, each of those opinions was joined by Chief Justice Rehnquist and Justice O'Connor.

Justice White's opinion concluded that since the Maryland legislature had decided that the sentencing jury should hear the degree of harm that the defendant had caused, its judgment was "entitled to particular deference" since sentencing considerations are "peculiarly questions of legislative policy."[31] Noting that victim impact information is regularly used in non-

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People v. Aaron, 299 N.W.2d 304 (Mich. 1980) (explaining the historical development of the felony murder rule and limiting its application); David Crump & Susan Waite Crump, *In Defense of The Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL'Y 359 (1985) (arguing in favor of the felony murder rule).

Tort doctrine regarding the foreseeability of the harm as the test for the limits of civil liability have also been plagued with controversy. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984).

29. *Booth*, 482 U.S. at 506 n.8. The problem of whether the criminal justice system should recognize that the taking of some lives should require a greater punishment than others is a difficult one to avoid. In the celebrated Charles Lindberg baby kidnapping case, *see* State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (1935), public hysteria over the crime and the enormous popularity of the family of the victim not only influenced the death sentence in that case but also changed the national law on felony murder, burglary and kidnapping following the case. *See* AMORE A. MOENSSENS, CASES AND COMMENTS ON CRIMINAL LAW 501-02 (5th ed. 1992) (1973). A jury sharing a general view of a victim's importance to society will likely bring that view into the jury room when it makes its decision in a capital case. One common example of victim preference is that many capital punishment statutes include, as an aggravating circumstance, the killing of a police officer in the line of duty. *See, e.g.*, GA. CODE ANN. § 17-10-30(b)(8) (Harrison 1994). Such statutes reflect a public legislative determination that the killing of a police officer is more deserving of severe punishment than the killing of an ordinary citizen.

30. *Booth*, 482 U.S. at 507.

31. *Id.* at 515 (White, J. dissenting) (citing *Gregg*, 428 U.S. at 184 (quoting Gore v. United States, 357 U.S. 386, 393 (1958))). Justice White's assessment of the legislature's traditionally broad role in sentencing is well founded. As one commentator cogently explained:

> [t]he legislature determines the kind and potential degree of punishment involved for each offense and the identity of the sentencing authority. The legislature's sentencing system should reflect its underlying view of the purposes served by the criminal sanction—retribution, specific and general deterrence, incapacitation, or

capital contexts, he suggested it was particularly appropriate to consider in a capital case.[32] Justice White characterized the concerns over the differing ability of family members to articulate the extent of their loss as "a make weight consideration."[33] Justice White dismissed the majority's concern over problems of rebutting victim impact evidence by pointing out that in the instant case such concerns were purely hypothetical.[34] Justice White also felt compelled to comment that if there were some disadvantage to the defendant, who in pressing hard to rebut a victim impact statement offended the jury, he should not "be heard to complain of the consequences of his tactical decisions."[35]

In a separate dissent, Justice Scalia emphasized his view that "the amount of harm one causes does bear upon the extent of his 'personal responsibility.' "[36] Questioning whether there was constitutional or historical support for such a limitation on the imposition of capital punishment, Justice Scalia noted the perception of unfairness generated by the absence of victim's input into the capital sentencing process.[37]

Although the Court was closely divided, the majority opinion left little flexibility to permit direct victim participation in capital cases. It appeared that at least for the foreseeable future, the use of victim impact evidence of

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> rehabilitation. . . . The criminal process should be structured to promote the legislature's sentencing system and goals.

Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 198-99 (1983).

32. *Booth*, 482 U.S. at 515-16.

33. *Id.* at 518.

34. *Id.* at 518, n.3.

35. *Id.*

36. *Id.* at 519 (Scalia, J., dissenting).

37. *Id.* at 520. (Scalia, J., dissenting). Justice Scalia's views were embraced by several commentators after the *Booth* decision. *See, e.g.*, Paul Boudreaux, Booth v. Maryland *and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177 (1989) (it may be proper to permit family anguish to be considered in order to satisfy a sense of justice); Lester K. Syren, Booth v. Maryland: *Whether Victim Impact Statements are Unconstitutional in Death Penalty Cases*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 171 (1989) (without victim impact evidence, capital juries are sentencing with "impaired vision"); Jackson R. Sharman, III, Comment, *Victim Impact Statements and the Eighth Amendment*—Booth v. Maryland 107 S. Ct. 2529 (1987), 11 HARV. J.L. & PUB. POL'Y. 583 (1988) (considered the decision in *Booth* a "willful disregard for a democratic choice," since the citizens of Maryland had passed the victim impact evidence statute); Regina A. Jones, Comment, *Eighth Amendment Prohibits Introduction of Victim Impact Evidence of Sentencing Phase of Capital Murder Trial*, 19 RUTGERS L.J. 1159 (1988) (accusing Supreme Court of overstepping the bounds of proper judicial review in *Booth* by issuing a per se blanket exclusion of victim impact information).

the type presented in *Booth*, designed to influence the imposition of the death sentence, was a closed question—despite the "victim based" concerns of the *Booth* dissenters. However, South Carolina prosecutors, who were reluctant to give up a powerful tool in their capital sentencing arsenal, brought another victim impact case to the Supreme Court less than two years after the *Booth* decision. In *South Carolina v. Gathers*,[38] the death sentence of Demetrius Gathers had been overturned by the South Carolina Supreme Court.[39]

The case involved the killing of Richard Haynes who Gathers encountered in a park. Along with some companions, Gathers beat and kicked Haynes severely, smashed a bottle and umbrella over his head and ultimately inserted the umbrella into his anus.[40] According to the evidence, the beating resulted when Gathers attempted to initiate a conversation with Haynes.[41] Haynes was a 31-year-old unemployed man who had spent some time in mental hospitals. He considered himself a minister, although he had no formal religious training and carried with him two bibles and other religious articles including religious tracts, one of which was entitled "The Game Guy's Prayer."[42] After the altercation, Gathers and the others rummaged through Haynes' pockets and scattered his personal belongings and the religious tracts.[43]

The articles found at the scene were admitted into evidence without objection. At the sentencing phase, the prosecutor made "extensive comments" to the jury about the victim's religious nature.[44]

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38. 490 U.S. 805 (1989).

39. *Id.* at 810.

40. *Id.* at 806-07.

41. *Id.* at 807.

42. *Id.*

43. *Id.*

44. *Id.* at 808-10. Although offering no direct victim impact testimony, the South Carolina prosecutor offered the following arguments to the sentencing jury:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn [sic] them across the bike path, thinking nothing of that.
>
> Among the many cards that Reverend Haynes had among his belongings was this card. . . . He had this [sic] religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.
>
> But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to

Relying on *Booth v. Maryland*, the South Carolina Supreme Court reversed the death sentence and remanded the case for a new sentencing. South Carolina appealed to the United States Supreme Court. Justice Brennan, joined by Justices White, Marshall, Blackmun and Stevens, affirmed the South Carolina court and extended the victim impact information prohibition to the prosecutor's closing arguments. Rejecting South Carolina's argument that the prosecutor's comments were only arguments relating to the circumstances of the crime, Justice Brennan reasoned:

> The fact that Gathers scattered Haynes' personal papers around his body while going through them looking for something to steal was certainly a relevant circumstance of the crime, and thus a proper subject for comment. But the prosecutor's argument in this case went well beyond that fact: he read to the jury at length from the religious tract the victim was carrying and commented on the personal qualities he inferred from Haynes' possession of the "Game Guy's Prayer" and the voter registration card. The *content* of these cards, however, cannot possibly have been relevant to the "circumstances of the crime." There is no evidence whatever that the defendant read anything that was printed on either the tract or the voter card. Indeed, it is extremely unlikely that he did so.[45]

Justice White, reluctantly joined the majority, concluding that he must join Brennan's opinion unless *Booth* was to be overruled.[46]

Justice O'Connor authored a dissenting opinion, joined by the Chief Justice and Justice Kennedy, in which she advanced the view that *Booth* was wrongly decided, and stated that she stood "ready to overrule it if the court would do so . . . ."[47] Justice O'Connor, however, suggested an alternative to requiring that *Booth* be overruled in order to reinstate Gathers' death sentence. She reasoned that the statements made by the prosecution in *Gathers*' could be distinguished from those in *Booth* since that case involved statements of harm to the victim's family and the statements at issue in

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give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game . . . ."

45. *Id.* at 811.

46. *Id.* at 812. (White, J., concurring).

47. *Id.* at 813-14. (O'Connor, J., dissenting).

Gathers were "solely prosecutorial comments about the victim himself."[48] She urged the majority to recognize "[t]he fact that there is a victim, and facts about the victim properly developed during the course of the trial, are not so far outside the realm of circumstances of the crime . . . ."[49]

In a separate dissent, Justice Scalia endorsed the immediate overruling of *Booth*. He believed that the state should decide whether it wished to consider victim impact evidence at capital sentencing proceedings. He wrote that it would be "a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."[50] In reviewing his earlier attack on the validity of the *Booth* decision, Justice Scalia wrote that "*Booth* has not even an arguable basis in the common law background that led up to the Eighth Amendment . . . ."[51]

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48. *Id.* at 814. Interestingly, in *Mills v. Maryland*, 486 U.S. 367, 397-98 (Rehnquist, C.J., dissenting) (1988), decided in the term after *Booth*, three justices joined the dissenting opinion of Chief Justice Rehnquist which suggested that *Booth*'s application should not extend to comments about the victim himself. Justice Kennedy had recently joined the Court. It would have appeared that there were at least five justices who by that time, had expressed a less restrictive view of *Booth*: the Chief Justice, Justice White, Justice O'Connor and now Justice Kennedy. Justice White, the other original dissenter in *Booth*, however, was in the majority in *Mills*, which reversed the conviction of the capital defendant on a jury instruction issue unrelated to victim impact evidence. In fact, he authored the opinion of the Court. Perhaps the replacement of Justice Powell, the author of *Booth*, with Justice Kennedy, who in his first term seemed willing to disagree with the sweeping conclusions about the admissibility of victim impact announced in *Booth*, would have logically resulted in the conclusion that *Booth* was ripe to be overruled in *Gathers*. Justice White's reluctance to abandon precedent so readily, *see supra* note 46, ironically resulted in an expansion of *Booth* in *Gathers*, despite a majority of justices that had already announced their disagreement with the general rule established just one year earlier.

49. *Gathers*, 490 U.S. at 816 (citation omitted). Statements about the victim of the killing can be more easily justified as "circumstances of the crime" than comments by surviving victims about their grief. The facts clearly indicate that Gathers knew what his victim was doing at the time he killed him. *Id.* at 815 (O'Connor, J., dissenting). In this regard, the South Carolina prosecutors and Justice O'Connor may well have been correct. Indeed, the state of South Carolina devoted all but a page and a half of its petition for certiorari's "reason for granting the writ" to making the point that O'Connor stressed in her dissent. *See* South Carolina v. Gathers, 490 U.S. 805, *petition for cert. filed* (Aug. 5, 1988) (No. 18-30).

50. *Gathers*, 490 U.S. at 825. (Scalia, J., dissenting).

51. *Id.* Justice Scalia commented that he doubted "overruling *Booth* will so shake the citizenry's faith in the Court." *Id.* at 824. He further urged that if *Booth* was going to be overruled it should occur as soon as possible. Justice Scalia reasoned that:

> [t]he respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law

It certainly appeared that even though *Booth* and *Gathers* were narrow 5-4 decisions, that the doctrine excluding victim impact was expanding and state courts were treating the *Booth/Gathers* duo as mandating limits on all forms of victim impact evidence.[52] Furthermore, considerable scholarly commentary endorsed the legitimacy of the *Booth/Gathers* victim impact prohibitions.[53]

Those who were disappointed that victims would have no voice in capital jury sentencing would not have long to wait for the court to examine its position on victim impact testimony. On the very last day of the 1990-1991 Term, the Supreme Court overturned the *Booth/Gathers* per se bar excluding victim's impact evidence in capital jury sentencing in its controversial 6-3 decision in *Payne*.[54] Chief Justice Rehnquist authored the Court's opinion that ended the brief reign of *Booth* as a formidable obstacle

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becomes premised upon their validity. The freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it. That is particularly true with respect to a decision such as *Booth*, which is in that line of cases purporting to reflect "evolving standards of decency" applicable to capital punishment.

Id. (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

52. *See, e.g.*, Pierce v. State, 576 So. 2d 236, 254 (Ala. Crim. App. 1990) (daughter's statement about the magnitude of her loss when defendant murdered her mother and her recommendation of the appropriate sentence mandated reversal in light of *Booth*); State v. Pennington, 119 N.J. 547, 575 A.2d 816 (1990) (prosecution argument that the jury should render a death sentence "even if it is just for the victim," was reversible error); State v. Clausell, 121 N.J. 298, 580 A.2d 221 (1990) (prosecutor may not divert the jury from material facts by undue emphasis on the "worthiness" of victim designed to excite the jury); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (officer's testimony detailing the impact of the victim officer's death on fellow police officers was improper).

53. For examples of commentary endorsing the *Booth* decision, see Susan J. Jump, Comment, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1213 (1987) ("the rights of defendants convicted of capital crimes cannot be sacrificed or infringed upon due to concerns for the victims"); Kevin J. McCoy, Note, *Preserving Integrity in Capital Sentencing*: Booth v. Maryland, 22 CREIGHTON L. REV. 333, 350 (1988) ("*Booth* stands as a sound decision which should help further understanding of the Court's consistent admonitions against arbitrariness in sentencing . . . ."); Charlton T. Howard, III, Note, Booth v. Maryland: *Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 731 (1988) ("formalized role for the victim at sentencing, no matter what its specific form, detracts from the sentencing authority's focus on the defendant and imperils the very concept of individualized sentencing").

54. Payne v. Tennessee, 501 U.S. 808 (1991).

to death penalty prosecution and which had been an aggravation to victim's rights advocates.[55]

In that Tennessee murder case the prosecution established that Payne's victims were 28-year-old Charisse Christopher, her two-year-old daughter, Lacie, and her three-year-old son, Nicholas. The three lived together in an apartment across the hall from Payne's girlfriend.[56] According to the State's evidence, on Saturday, June 27, 1987, Payne visited his girlfriend's apartment expecting her to return from out of town. While he waited, he passed the time injecting cocaine and drinking beer.[57] After leaving the apartment for a time, Payne returned, but rather than returning to his girlfriend's apartment, he entered the Christopher's apartment and began making sexual advances towards Charisse.[58]

When she resisted his advances, Payne became violent and a downstairs neighbor reported hearing a "blood curdling scream" from the Christopher residence.[59] Police responded to the scene and observed Payne covered with blood.[60] Payne struck the officer and fled.[61] Further investigation revealed that Charisse Christopher and her children were lying on the kitchen floor, suffering from multiple stab wounds. Charisse and Lacie were dead; Nicholas, however, survived his serious injuries.[62]

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55. See sources cited above in note 37.

56. *Payne*, 501 U.S. at 811.

57. *Id.* at 812.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 812 (citing State v. Payne, 791 S.W.2d 10, 12 (Tenn. 1990)).

62. *Id.* The Court in its opinion drew from the lower court painful details of the murder scene as discovered by the authorities:

> Inside the apartment, the police encountered a horrifying scene. Blood covered the walls and floor throughout the unit. Charisse and her children were lying on the floor in the kitchen. Nicholas, despite several wounds inflicted by a butcher knife that completely penetrated through his body from front to back, was still breathing. Miraculously, he survived, but not until after undergoing seven hours of surgery and a transfusion of 1700 cc's of blood—400 to 500 cc's more than his estimated normal blood volume. Charisse and Lacie were dead.
>
> Charisse's body was found on the kitchen floor on her back, her legs fully extended. She had sustained 42 direct knife wounds and 42 defensive wounds on her arms and hands. The wounds were caused by 41 separate thrusts of a butcher knife. None of the 84 wounds inflicted by Payne were individually fatal; rather, the cause of death was most likely bleeding from all of the wounds.
>
> Lacie's body was on the kitchen floor near her mother. She had suffered stab wounds to the chest, abdomen, back, and head. The murder weapon, a butcher knife, was

Payne was later apprehended. In its opinion, the Supreme Court characterized the evidence against Payne as "overwhelming" and "uncontroverted."[63]

The jury, obviously persuaded that the evidence was at least adequate, returned guilty verdicts against Payne on all counts.[64]

At the sentencing phase of the trial, the defense presented evidence of four witnesses: a clinical psychologist, Payne's mother, father, girlfriend, and Bobbie Thomas.[65] Dr. John T. Huston testified that Payne's low IQ score qualified him as mentally handicapped and found him to be "the most polite prisoner he had ever met."[66] The doctor, however, found no evidence to support that Payne was either "psychotic" or "schizophrenic."[67]

Payne's parents testified their son had no prior criminal record and no history of drug or alcohol abuse.[68] Bobbie Thomas, Payne's girlfriend at the time of the incident, corroborated the testimony of Payne's parents.[69] She stated that she met Payne in church and that he was a caring person who "behaved just like a father" to her three children.[70]

The state countered with the victim impact testimony of Charisse Christopher's mother, Mary Zvolanek, who described how the murder of Charisse and Lacie had affected Nicholas.[71] The prosecutor referred to the

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found at her feet. Payne's baseball cap was snapped on her arm near her elbow. Three cans of malt liquor bearing Payne's fingerprints were found on a table near her body, and a fourth empty one was on the landing outside the apartment door.

Payne was apprehended later that day hiding in the attic of the home of a former girlfriend. As he descended the stairs of the attic, he stated to the arresting officers, "Man, I ain't killed no woman . . . ." According to one of the officers, Payne had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid . . . ." He had blood on his body and clothes and several scratches across his chest. It was later determined that the blood stains matched.

Id. at 812-13 (citing State v. Payne, 791 S.W.2d 10, 12 (Tenn. 1990)) (citation omitted).

63. *Id.* at 812-13.

64. *Id.* at 813.

65. *Id.* at 814.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* Zvolanek's testimony about Nicholas was cited by the court as follows:

He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and

emotional testimony of Zvolanek and discussed the long-term victim impact extensively in his closing argument,[72] urging that the jury return with the death penalty. The jury imposed death on each of the two murder counts.[73]

Seizing the opportunity to strike down the *Booth/Gathers* victim impact exclusion, Chief Justice Rehnquist discussed the general principles to be applied when the Supreme Court considers overruling one of its prior precedents.[74] The Chief Justice noted that "when governing decisions are

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asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

Id. at 814-15.

72. *Id.* at 815. The prosecutor's argument referring to the impact of the crime on Nicholas was as follows:

> There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

Id.

During his comments on rebuttal, the prosecutor made additional references to the impact of the crime on Nicholas:

> No one will ever know about Lacie Jo because she never had the chance to grow up. Her life was taken from her at the age of two years old. So, no there won't be a high school principal to talk about Lacie Jo Christopher, and there won't be anybody to take her to her high school prom. And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby.
>
> . . .
>
> [Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that child will carry forever.

Id. at 816.

73. *Id.*

74. *Id.* at 828.

unworkable or badly reasoned, the Court has never felt constrained to follow precedent."[75] In reasoning that the *Booth/Gathers* doctrine was unworkable, the Chief Justice examined the philosophy and history of sentencing.[76] Citing the 18th century Italian criminologist Cesare Beccaria, Chief Justice Rehnquist said that the notion "the punishment should fit the crime" has long been a guiding principle of sentencing.[77]

He vigorously complained that the *Booth/Gathers* principle was unfair to the state since "the State is barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' or demonstrating the loss to the victim's family and to society."[78]

Seizing upon Justice O'Connor's earlier dissent in *Gathers*, Rehnquist wrote that "*Booth* deprives the State of the full moral force of its evidence . . . ."[79] Chief Justice Rehnquist seemed particularly annoyed by the fact that in *Payne* the defendant was able to place evidence of his good character before the jury but the State was not able to do the same regarding the victims.[80]

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75. *Id.* at 827.

76. *Id.* at 819-20.

77. *Id.* at 819.

78. *Id.* at 822 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)). Chief Justice Rehnquist cited *Exodus* 21:22-23; JAMES A. FARRER, CRIMES AND PUNISHMENTS 199 (London 1880); and S. ANTON WHEELER ET. AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 56 (1988), in support of the proposition that the punishment should fit the crime. *Id.* at 819-20. Implicit in Rehnquist's assertions is the principle of retribution. The Supreme Court has often addressed such a punishment objective. For example, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court, quoting Justice Potter Stewart, commented on the value of retribution:

> [t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Id. at 183 (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972)).

79. *Payne*, 501 U.S. at 825.

80. *Id.* at 826. Justice Rehnquist quoted the Supreme Court of Tennessee in making his point:

> The Supreme Court of Tennessee in this case obviously felt the unfairness of the rule pronounced by *Booth* when it said: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."

The Court reasoned that such testimony was relevant and perfectly consistent with the traditional latitude of the states to devise procedures for the use of victim impact information.[81] First, it said that if evidence was "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[82] The Court further noted that it was only addressing the admissibility of evidence and argument relating to the impact of the victim's death on the family and not characterizations and opinions about the crime and the appropriateness of a death sentence that was part of the evidence at issue in *Booth*.[83] No evidence of such opinions or characterizations were at issue in *Payne*.

Payne also produced three concurring opinions which appeared to be an attempt to explain or justify Rehnquist's abrupt departure from precedent. Justice O'Connor agreed with the majority that a State may determine that victim-impact testimony is relevant to a capital sentencing decision, relying primarily on a societal consensus in support of allowing the evidence.[84] Justice O'Connor relied heavily on a due process analysis to conclude that the result in *Payne* was appropriate.[85]

Justice Scalia, in his concurring opinion, vigorously attacked the dissent of Justice Thurgood Marshall.[86] In his substantive discussion of victim impact evidence, he not only relied on societal acceptance of victim impact information but harshly criticized the line of cases beginning with *Lockett*[87] which entitled the defendant to have broad latitude in presenting mitigating evidence to the sentencing jury.[88]

A separate concurrence by Justice Souter and joined by Justice Kennedy focused on the fact that impact on the victim's survivors is a foreseeable consequence of murder and that it was not unreasonable to conclude that the defendant should be assessed for the consequences of the risk he assumed.[89]

Id. (quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)).

81. *Id.* at 824-25.

82. *Id.* at 825.

83. *Id.* at 830 n.2.

84. *Id.* at 830-31. (O'Connor, J., concurring).

85. *Id.* at 831-32 (O'Connor, J., concurring).

86. *Id.* at 833-34 (Scalia, J., concurring). Justice Marshall's dissent is discussed in detail *infra* notes 91-96 and accompanying text.

87. *Id.* at 833. *See supra* note 9.

88. *Id.* at 833-34.

89. *Id.* at 838-39. According to Justice Souter:

> [e]very defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique

Using an elaborate hypothetical, he reasoned that *Booth* should be overruled because it embraced a standard that was unworkable and could lead to potentially arbitrary results.[90]

In a blistering dissent, Justice Marshall criticized the court for its casual departure from precedent. He noted that the majority made no "extraordinary showing"[91] before overruling its recent decisions in *Booth* and *Gathers* and expressed disbelief in the majority's "radical assertion that it need not even try."[92] Warning that the Court's action in *Payne* paid little respect to precedent, he identified several potential cases that might be ripe for reexamination and revision under the court's analysis in *Payne*.[93] He

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person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death.

Id. at 838.

90. *Id.* at 839-41. Justice Souter's concurring opinion posed the following hypothetical situation:

> Assume that a minister, unidentified as such and wearing no clerical collar, walks down a street to his church office on a brief errand, while his wife and adolescent daughter wait for him in a parked car. He is robbed and killed by a stranger, and his survivors witness his death. What are the circumstances of the crime that can be considered at the sentencing phase under Booth? The defendant did not know his victim was a minister, or that he had a wife and child, let alone that they were watching. Under Booth, these facts were irrelevant to his decision to kill, and they should be barred from consideration at sentencing. Yet evidence of them will surely be admitted at the guilt phase of the trial. The widow will testify to what she saw, and, in so doing, she will not be asked to pretend that she was a mere bystander. She could not succeed at that if she tried. The daughter may well testify too. The jury will not be kept from knowing that the victim was a minister, with a wife and child, on an errand to his church. This is so not only because the widow will not try to deceive the jury about her relationship, but also because the usual standards of trial relevance afford factfinders enough information about surrounding circumstances to let them make sense of the narrowly material facts of the crime itself.

91. *Id.* at 848. (Marshall, J., dissenting).

92. *Id.* In an almost prophetic memorandum written by one of Marshall's law clerks to the late Justice in the *Booth* case, it was advised that he should "[f]ight like hell on this one." BENCH MEMORANDUM TO JUSTICE MARSHALL *re Booth v. Maryland* at 7, March 24, 1987 (reproduced from the Thurgood Marshall Papers, Collections of the Manuscript Division, Library of Congress). The clerk warned that "[Marshall's] prior rejection of retribution as a justification for the death penalty, plus the risk of arbitrary results, should make this a close case legally and morally for the right wingers." *Id.*

The memorandum's comments foreshadowed the extraordinary constitutional litigation that followed the *Booth* case and the eventual "right wing" victory in *Payne*, particularly the persistent efforts of the conservatives to reexamine the victim's impact issue. *See infra* note 111.

93. *Payne*, 501 U.S. at 851 (Marshall, J., dissenting). Justice Marshall referred to

asserted that "[p]ower, not reason, is the new currency of this Court's decisionmaking."[94] Lamenting the possible future consequences of the Court's decision, Justice Marshall wrote: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this court as a protector of the powerless."[95]

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several decisions at risk of being overruled as follows: Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (authority of Federal government to set aside broadcast licenses for minority applicants); Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) (First Amendment right not to be denied public employment on the basis of party affiliation); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990) (First Amendment right to advertise legal specialization); Grady v. Corbin, 495 U.S. 508 (1990) (right under Double Jeopardy Clause not to be subjected twice to prosecution for same criminal conduct); Zinermon v. Burch, 494 U.S. 113 (1990) (due process right to procedural safeguards aimed at assuring a voluntary decision to commit oneself to mental hospital); James v. Illinois, 493 U.S. 307 (1990) (Fourth Amendment right to exclusion of illegally obtained evidence introduced for impeachment of defense witness); Mills v. Maryland, 486 U.S. 367 (1988) (Eighth Amendment right to jury instructions that do not preclude consideration of nonunanimous mitigating factors in capital sentencing); United States v. Paradise, 480 U.S. 149 (1987) (right to promotions as remedy for racial discrimination in government hiring); Ford v. Wainwright, 477 U.S. 399 (1986) (Eighth Amendment right not to be executed if insane); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (reaffirming right to abortion recognized in Roe v. Wade, 410 U.S. 113 (1973)); Aguilar v. Felton, 473 U.S. 402 (1985) (Establishment Clause bar on governmental financial assistance to parochial schools); Rankin v. McPherson, 483 U.S. 378 (1987) (First Amendment right of public employee to express views on matter of public concern); Rock v. Arkansas, 483 U.S. 44 (1987) (Fifth Amendment and Sixth Amendment right of criminal defendant to provide hypnotically refreshed testimony on his own behalf); Gray v. Mississippi, 481 U.S. 648 (1987) (rejecting applicability of harmless error analysis to Eighth Amendment right not to be sentenced to death by "death qualified" jury); Maine v. Moulton, 474 U.S. 159 (1985) (Sixth Amendment right to counsel violated by introduction of statements made to government informant-codefendant in course of preparing defense strategy); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting theory that Tenth Amendment provides immunity to states from federal regulation); Pulliam v. Allen, 466 U.S. 522 (1984) (right to obtain injunctive relief from constitutional violations committed by judicial officials).

94. *Payne*, 501 U.S. at 844 (Marshall, J., dissenting). Justice Marshall warned that "the continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals whom *now* comprise a majority of this Court." *Id.* at 851. *See* Ranae Bartlett, Note, Payne v. Tennessee: *Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561 (1992).

95. *Payne*, 501 U.S. at 856 (Marshall, J., dissenting).

The controversial dissenting opinion marked the end to Justice Marshall's twenty-four year career as an associate justice of the Supreme Court.[96]

Justice Stevens wrote a dissenting opinion, joined by Justice Blackmun,[97] in which he described the majority's decision as representing "a dramatic departure" from settled principles of capital sentencing jurisprudence.[98] He believed that the *Payne* decision could only be intended to appeal to the "sympathies" and "emotions" of jurors, which had always been patently improper in capital punishment cases.[99] He wrote:

> Irrelevant victim impact evidence that distracts the sentence from the proper focus of sentencing and encourages reliance on emotion and other arbitrary factors necessarily prejudices the defendant.
>
> The majority's apparent inability to understand this fact is highlighted by its misunderstanding of Justice Powell's argument in *Booth* that admission of victim impact evidence is undesirable because it risks shifting the focus of the sentencing hearing away from the defendant and the circumstances of the crime and creating a "'mini-trial' on the victim's character." *Booth* found this risk insupportable not, as today's majority suggests, because it creates a "tactical" "dilemma" for the defendant, but because it allows the possibility that the jury will be so distracted by prejudicial and irrelevant considerations that it will base its life-or-death decision on whim or caprice.[100]

Justice Stevens made it clear that he believed that the underlying premises upon which the *Booth* decision was based were constitutionally

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96. Justice Marshall announced his retirement on the day that *Payne* was decided. Although he did not publicly criticize his colleagues regarding *Payne*, popular accounts suggest that the *Payne* decision left the Court's members angry and divided, and Justice Marshall bitter. *See* DAVID G. SAVAGE, TURNING RIGHT, THE MAKING OF THE REHNQUIST SUPREME COURT 418-20 (1992). One Supreme Court observer went so far as to report that the tone of the court was "rancor[ous]" and "insult[ing]" and that there was "blood on the conference room floor . . ." during the months prior to the final alignment in *Payne* being reached. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 403 (1993). During this very tense period on the Court, Chief Justice Rehnquist was described as "unaffected, and around the Court he was in an especially chipper mood." SAVAGE, *supra*, at 408.

97. *Payne*, 501 U.S. at 856 (Stevens, J., dissenting).

98. *Id.*

99. *Id.* at 858-59.

100. *Id.* at 864 (citations omitted).

sound. Soon after the *Payne* decision was announced, many lower courts anxiously embraced it.[101]

The 6-3 Supreme Court vote in *Payne* ended the five years of speculation regarding how long the controversial constitutional bar to victim impact evidence would stand, in light of the changing personnel on the Supreme Court. The addition of Justice Souter to the Court in 1990, who sided with those overruling the *Booth* decision, combined with the retirement of Justice Thurgood Marshall in 1991, on the day *Payne* was decided, reinforced the continuing validity of victim impact evidence in capital cases. The appointment of conservative Justice Clarence Thomas to the Supreme Court as Marshall's replacement by President George Bush,[102] combined with the 1993 retirement of Justice Harry Blackmun, removed from the Court another Justice who had voted in favor of the bar to victim impact evidence in *Booth*.[103]

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101. *See* Black v. Collins, 962 F.2d 394 (5th Cir. 1992) (prosecution argument that victim was a hard-working devoted wife and mother was not inflammatory or fundamentally unfair); Arizona v. Atwood, 832 P.2d 593 (Ariz. 1992) (the fact that 3,000 citizens marched and burned a trailer where defendant slept was admissible victim impact evidence in a court sentencing proceeding); Johnson v. Arkansas, 934 S.W.2d 179, 189 (Ark. 1996) (argument to jury suggesting that it punish the defendant for taking away the victim's mother's "right" to watch her daughter grow up and marry); People v. Stanley, 897 P.2d 481, 523 (Cal. 1995) (argument inviting jurors to compare sympathy for defendant's family with sympathy for the victim's family was not improper); People v. Sandoval, 841 P.2d 862, 881 (Cal. 1992) (prosecution's argument requesting that the jury put the victim "in that casket" and put the victim's family "around it" was not improper); People v. Johnson, 842 P.2d 1 (Cal. 1992) (not improper for the prosecutor to refer to orphaned child or victim's desire for revenge); *In re* Petition, 597 A.2d 1 (Del. 1991) (trial court precluded from refusing to consider whether it would permit victim impact evidence, writ of mandamus issued to require trial court to abide by the state statute); Homick v. Nevada, 825 P.2d 600 (Nev. 1992) (argument that defendant was responsible for the victim's child being without a mother was proper); Lucas v. Evatt, 416 S.E.2d 646 (S.C. 1992) (closing argument by prosecutor referring to the victim's seven grandchildren was not fundamentally unfair under *Payne*).

102. Appointed by President Bush on October 18, 1991; took office on October 23, 1991. Justice Thomas has generally been unwilling to recognize the claims of capital defendants before the Supreme Court. For a survey of Justice Thomas' capital punishment jurisprudence, see Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593 (1995) (discussing the conservative leanings of Justice Thomas in the area of the rights of criminal defendants in general and capital punishment in particular).

103. Justice Blackmun retired in July 1993.

Before Justice Blackmun left the Court, however, he issued a scathing review of the fairness of capital punishment in *Callins v. Collins*.[104] Justice Blackmun reasoned that capital punishment could not be fairly administered as it currently existed.[105] This view represented a departure from his earlier capital punishment jurisprudence.[106] Justice Blackmun's retirement from the Court left Justice John Paul Stevens as the only member of the Supreme Court who had voted for exclusion of victim impact testimony in capital jury cases. Even assuming that the newcomers to the Court, Justice Ruth Bader Ginsburg[107] and Justice Stephen Breyer,[108] could be persuaded that *Booth* was correct in excluding victim impact evidence, the current composition of the Court leaves little doubt that a solid majority supporting the admission of victim impact evidence remains for the foreseeable future.[109] It would also

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104. 510 U.S. 1141 (1994) (Blackmun, J., dissenting). This case was a dissent from a denial of a petition for writ of certiorari.

105. Justice Blackmun stated:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.

Id. at 1145 (Blackmun, J., dissenting).

106. Justice Blackmun endorsed capital punishment when he was initially appointed to the Supreme Court and was one of the original dissenters in *Furman v. Georgia*, 408 U.S. 238 (1972). He also endorsed as constitutional the 1976 trilogy of state capital punishment statutory schemes. *See* discussion of Gregg v. Georgia, Proffitt v. Florida, and Jurek v. State, *supra* note 26. However, his comments in *Callins v. Collins*, 501 U.S. at 1141 reflect a dramatic departure from his earlier capital punishment position. For an excellent examination of Justice Blackmun's change of heart, see D. Grier Stephenson, Jr., *Justice Blackmun's Eighth Amendment Pilgrimage*, 8 B.Y.U. J. PUB. L. 271 (1994) (describing Justice Blackmun's capital jurisprudence from his career on the Federal Circuit Court of Appeals until his retirement from the Supreme Court). Professor Stephenson remarked that "few justices in modern Supreme Court history have evidenced a more remarkable transformation in constitutional jurisprudence." *Id.* at 320.

107. Appointed by President Clinton on August 3, 1993; took office on August 10, 1993.

108. Appointed by President Clinton on August 2, 1994; took office on September 30, 1994.

appear unlikely that the Supreme Court would reverse itself twice on the same issue in the period of a relatively few years,[110] especially after having taken certiorari on the victim impact issue five times in the five years between 1986 and 1991.[111] The *Payne* decision appears to have made the admissibility of victim impact information in capital jury sentencing, at least as a matter of Eighth Amendment jurisprudence, secure.

III. THE CASE FOR VICTIM IMPACT INFORMATION: THE ORIGIN AND APPROVAL OF THE MODERN VICTIM PARTICIPATION APPROACH

Historically in Europe and England, prosecution of a criminal case had not always been a strictly public matter.[112] However, the strain of the expense of investigating and conducting a private prosecution exacted a heavy financial burden on most victims, thus a system of public prosecution became necessary. That system, where criminal matters are brought in the name of the state rather than an individual citizen, has completely dominated American criminal law and its institutions.[113] One trade-off that has resulted

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109. Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy and Souter voted in the majority in *Payne*, 501 U.S. at 810.

110. The Supreme Court has, on occasion, overruled a precedent soon after it was announced. An example of the Supreme Court overruling a recent precedent is in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), overruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). The Court in *Barnette* overruled *Gobitis*' 8-1 decision requiring that Jehovah's Witnesses salute the flag in public school. Some accounts of this overruling suggest that widespread violence against Jehovah's Witnesses by public officials and private citizens prompted the Court's change of heart since the Court's membership only changed by two Justices. PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 15-35 (1988). *See also* Victor W. Rotnem & F.G. Folson, Jr., *Recent Restrictions Upon Religious Liberty*, 36 AMER. POL. SCI. REV. 1053 (1942).

111. Not only was the victim impact issue addressed in *Booth*, *Mills* and *Gathers*, but in *Payne v. Tennessee*, 498 U.S. 1080 (1991), the Supreme Court requested the issue of overruling *Booth* be briefed although it had not been raised by either party. The Court also granted, then dismissed, another petition on the issue of overruling *Booth*, in *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), *cert. granted*, 498 U.S. 957 (1990), *and cert. dismissed as improvidently granted*, 498 U.S. 336 (1991).

112. Lynne N. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985) (summarizing European and English experience evolving from a system of self help and family vengeance to a system of public prosecution).

113. Phillip B. Kurland & D.W.M. Waters, *Public Prosecutions in England 1854-79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 512 (1959).

"The 'criminal law' of Europe before the twelfth century was predominantly private. Public officers did not search out and investigate crimes. Injuries were brought to the

from the adoption of a public prosecution system has been marginalizing the role of individual victims of crime in the criminal justice process; that is, victims have been said to play only a "distinctly secondary role" in the criminal justice system.[114]

One concern highlighting the shortcomings of the public prosecution system is the perception of unequal treatment of victims when compared to the advantages enjoyed by the criminally accused. Many resources are routinely committed to aid offenders who have already exacted a cost on society.[115] The laws protecting the accused and the existence of constitutional protections for criminal defendants were ultimately compared to the relative absences of specific rights for victims of crime prior to the early 1980's by victims' rights advocates.[116] The result of the tensions between liberal criminal procedure reforms[117] and more conservative victim-focused concerns[118] contributed to the creation of the modern victims' rights

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attention of the officials of justice by those who had suffered them, and it was the accuser's responsibility to see that legal officers acted." EDWARD PETERS, TORTURE 41 (1985).

114. Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 519 (1982).

115. *See* Henderson, *supra* note 112 (collecting examples of financial programs to rehabilitate offenders).

116. *See* E. VAN ALLEN, OUR HANDCUFFED POLICE: THE ASSAULT UPON LAW AND ORDER IN AMERICA AND WHAT CAN BE DONE ABOUT IT (1968).

117. The Warren Court initiated a number of criminal procedure reforms beginning with the Gideon v. Wainwright, 372 U.S. 335 (1963), principle of right to counsel. The activism of the Warren years on the Court has been described "as one of the most creative and daring periods in constitutional history." ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 337 (1972). During that period, the Court had "undertaken to supervise more closely than ever before our machinery of criminal law enforcement . . . ." *Id.* at 343.

Key to those reforms was the implementation of the right to counsel in several stages of the criminal justice process. *See* Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel during police interrogation); Brewer v. Williams, 430 U.S. 387 (1977) (right to counsel once adversary proceeding has begun); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a critical stage requiring state to provide indigent counsel); Moore v. Illinois, 434 U.S. 220 (1977) (in court identification at a preliminary hearing requires counsel to protect defendant's interest); United States v. Wade, 388 U.S. 218 (1967) (pretrial post-indictment line-up requires counsel); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel when a defendant might be imprisoned for an offense); *In re* Gault, 387 U.S. 1 (1967) (right to counsel applies to juveniles when they might be committed to a state institution); Douglas v. California, 372 U.S. 353 (1963) (if defendant has a first appeal as a matter of right under state law, he is entitled to counsel); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at probation revocation hearings).

118. One writer has gone so far as to suggest that the Supreme Court put "a premium on lawlessness while it in effect penalizes the victim . . . ." E. VAN ALLEN, *supra* note 116, at 119.

movement. The movement seeks to create specific rights to be enjoyed by victims in the criminal process, even if establishing such participation requires aggressive political action. Indeed, "[m]ost of the victim's rights activity has been far from dispassionate, and currently, the victims rights 'movement' has a decidedly conservative bent."[119]

The political activity of the victims' rights movement resulted in the commissioning of an influential report initiated by the Reagan Administration entitled the *President's Task Force on Victims of Crime*.[120] The report extensively addressed the concerns of victims of crime and proposed a host of solutions designed to promote equity in the criminal justice systems from the victim's point of view. Many of the report's recommendations also sought to remove substantive criminal process rights already established by the Supreme Court. Among those recommendations

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119. Henderson, *supra* note 112, at 951.

120. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME FINAL REPORT (1982) (recommendations for governmental agencies). In a statement from Lois Haight Herrington, chairman of the Task Force, to President Ronald Reagan, the goal and intentions of the committee to move the criminal justice systems toward greater recognition of victims was clearly explained:

> Dear Mr. President:
>
> When you established the President's Task Force on Victims of Crime on April 23, 1982, you led the nation into a new era in the treatment of victims of crime. Never before has any President recognized the plight of those forgotten by the criminal justice system—the innocent victims of crime.
>
> In meeting the charge that you gave us, we reviewed the available literature on the subject of criminal victimization; we interviewed professionals, both in and out of the criminal justice system, who are responsible for serving victims; and, most importantly, we spoke with citizens from around the country whose lives have been altered by crime.
>
> We found that the perception you shared when you gave us our charge is, unfortunately, true. The innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional, and financial—have gone unattended.
>
> We also found that there is no quick remedy to the innocent victim's plight. Only the sustained efforts of federal, state, and local governments, combined with the resources of the private sector, can restore balance to the criminal justice system.
>
> Citizens from all over the nation told us again and again how heartened they were that this Administration has taken up the challenge, ignored by others in the past, of stopping the mistreatment and neglect of the innocent by those who take liberty for license and by the system of justice itself.

Id. at ii.

were suggestions to promote victim confidentiality,[121] provide reasonable counseling for violent crime victims and their families,[122] permit hearsay at preliminary criminal hearings,[123] reform the bail system,[124] abolish the exclusionary rule,[125] provide notice for parole hearings,[126] abolish parole and judicial discretion at sentencing,[127] increase criminal incident reporting requirements at schools,[128] provide for increased reporting of arrest records of child abusers,[129] require victim impact statements at sentencing,[130] and

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121. "Legislation should be proposed and enacted to ensure that addresses of victims and witnesses are not made public or available to the defense, absent a clear need as determined by the court." *Id.* at 17.

122. "Legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery and subpoena." *Id.*

123. "Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person." *Id.*

124. The Task Force recommended that:

> Legislation should be proposed and enacted to amend the bail laws to accomplish the following:
>
> a. Allow courts to deny bail to persons found by clear and convincing evidence to present a danger to the community;
>
> b. Give the prosecution the right to expedited appeal of adverse bail determinations, analogous to the right presently held by the defendant;
>
> c. Codify existing case law defining the authority of the court to detain defendants as to whom no conditions of release are adequate to ensure appearance at trial;
>
> d. Reverse, in the case of serious crimes, any standard that presumptively favors release of convicted persons awaiting sentence or appealing their convictions;
>
> e. Require defendants to refrain from criminal activity as a mandatory condition of release; and
>
> f. Provide penalties for failing to appear while released on bond or personal recognizance that are more closely proportionate to the penalties for the offense with which the defendant was originally charged.

Id.

125. "Legislation should be proposed and enacted to abolish the exclusionary rule as it applies to Fourth Amendment issues." *Id.*

126. "Legislation should be proposed and enacted to open parole release hearings to the public." *Id.* at 18.

127. "Legislation should be proposed and enacted to abolish parole and limit judicial discretion in sentencing." *Id.*

128. The Task Force suggested that:

> Legislation should be proposed and enacted to require that school officials report violent offenses against students or teachers, or the possession of weapons or narcotics on school grounds. The knowing failure to make such a report to the police, or deterring others from doing so, should be designated a misdemeanor.

Id.

129. "Legislation should be proposed and enacted to make available to businesses and organizations the sexual assault, child molestation, and pornography arrest records of

expand victim employee assistance[131] and financial assistance programs.[132] It is from this commission report and the movement supporting its adoption that the modern "victims rights" movement can be traced.[133]

However, the recognition of the victims rights movement has not been exclusively legislative but also judicial. For example, the former Chief Justice of the Supreme Court, Warren Burger, noted that "[i]n the administration of justice, courts may not ignore the concerns of victims."[134] Justice Anthony Kennedy, prior to his elevation to the Supreme Court, commented that steps to recognize the rights of victims are necessary "as a simple matter of distributive justice, a decent and compassionate society should recognize the plight of its victims and design its criminal system to alleviate their pain, not increase it."[135]

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prospective and present employees whose work will bring them in regular contact with children." *Id.*

130. Legislation should be proposed and enacted to accomplish the following:

a. Require victim impact statements at sentencing;

b. Provide for the protection of victims and witnesses from intimidation;

c. Require restitution in all cases, unless the court provides specific reasons for failing to require it;

d. Develop and implement guidelines for the fair treatment of crime victims and witnesses; and

e. Prohibit a criminal from making any profit from the sale of the story of his crime. Any proceeds should be used to provide full restitution to his victims, pay the expenses of his prosecution, and finally, assist the crime victim compensation fund.

Id.

131. "Legislation should be proposed and enacted to establish or expand employee assistance programs for victims of crime employed by government." *Id.*

132. "Legislation should be proposed and enacted to ensure that sexual assault victims are not required to assume the cost of physical examinations and materials used to obtain evidence." *Id.*

133. For state and federal legislative action, the Task Force also proposed that the Sixth Amendment of the Constitution be amended to include the provision that: "the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.* at 114.

In support of its amendment, the Task Force explained, that in its view "[t]he victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be redressed. . . . [T]he fundamental rights of innocent citizens cannot adequately be perserved by any less decisive action. *Id.* at 114-15. *See* Carole Mansur, Payne v. Tennessee*: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 NEW ENG. L. REV. 713, 715-16 (1993).

134. Morris v. Slappy, 461 U.S. 1, 14 (1983).

135. Anthony Kennedy, Address at the Sixth South Pacific Judicial Conference (Mar. 3-5 1987), *cited in* George Nicholson, *Victims' Rights, Remedies, and Resources: A Maturing Presence in America*, 23 PAC. L.J. 828 (1992).

The movement has not only resulted in increased victim participation in criminal cases by encouraging states to adopt victim impact statements at sentencing,[136] it has also spawned many recent successful state efforts to ratify victim based constitutional amendments.[137] Even federal law provides

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136. Much of the political progress that was made during the early victims' rights movement began with organized victim groups, such as the National Organization of Victim Assistance (NOVA); additional groups, such as Mothers Against Drunk Driving (MADD) and the Sunny von Bulow National Victim Advocacy Center, joined in the state by state legislative battle for greater victim participation in the criminal process. Paul G. Cassell, *Balancing the Scales of Justice: The Cases for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1382-83.

137. See, as examples, the following victims' rights constitutional amendments and related statutes:

Arizona:	(1)	ARIZ. CONST. art. 2, § 2.1 (1996).
	(2)	1991 Ariz. Legis. Serv. 229 (West) (Enabling Legislation).
	(3)	ARIZ. REV. STAT. ANN. §§ 13-4401, 4437 (1989) (Enabling legislation)
California:	(1)	CAL. CONST. Art. I, § 28 (1983).
	(2)	CAL. PENAL CODE § 679 (West 1996) (Rights of victims and Witnesses of Crime - originally enacted in 1986).
Colorado:	(1)	COLO. CONST. Art. II, § 16a (1992).
	(2)	COLO. REV. STAT. §§ 24-4.1-301-304 (Enabling legislation enacted in 1992).
Florida:	(1)	FLA. CONST. art. I, § 16.
	(2)	1988 Fla. Laws ch. 88-96. (Enabling Legislation).
Illinois:	(1)	ILL. CONST. art. I, § 8.1 (1992).
	(2)	ILL. ANN. STAT. ch. 120/1-120/9 (Smith-Hurd 1992) (Bill of Rights for Victims and Witnesses of Violent Crime - predates constitutional amendment - originally enacted in 1984).
Kansas:	(1)	KAN. CONST. art. 15, § 15 (1992).
	(2)	KAN. STAT. ANN. § 74.7333 (1989) (predates constitutional amendment—originally enacted in 1989)
Maryland:	(1)	MD. CODE. ANN. art. 41, §§ 4-504(d), 4-511A (Michie Supp. 1996).
Michigan:	(1)	MICH. CONST. art. I, § 24 (1988).
	(2)	MICH. COMP. LAWS § 780.751 (1996) (Crime Victim's Rights Act—predates constitutional amendment—originally enacted in 1985).
Missouri:	(1)	MO. CONST. art. I, § 32 (1992).
	(2)	MO. ANN. STAT. §§ 595.200-595.218 (West 1986) (Victim's and Witness' Rights—predates constitutional amendment—originally enacted in 1986).
New Mexico:	(1)	N.M. CONST. art. II, § 24 (1992).

for victim participation in the sentencing process.[138] The desire for victim participation in the criminal process combined with the overwhelming

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(2) N.M. STAT. ANN. § 52:413-34 (1985) (Crime Victim's Bill of rights—predates constitutional amendment—originally enacted in 1985).

Rhode Island: (1) R.I. CONST. art. I, § 23 (1986).
(2) R.I. GEN. LAWS §§ 12-28-1-12-28-10 (1993) (Victim's Bill of Rights—predates constitutional amendment—originally enacted in 1983).

Texas: (1) TEX. CONST. art. I, § 30 (1989).
(2) TEX. CRIM. PROC. CODE ANN. § 56.01-56.12 (West 1985) (Rights of Crime Victims—predates constitutional amendment—originally enacted in (1985).

Wash.: (1) WASH. CONST. (1983).
(2) WASH. REV. CODE § 7.69.030 (1981) (Rights of Victims and Witnesses of Crime—predates constitutional amendment—originally enacted in 1979).

Compilation of statutes cited in CONSTITUTIONAL AMENDMENTS FOR CRIME VICTIMS' RIGHTS UPDATE, Victims Constitutional Amendment Network (1993). *See also* Jennifer G. Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1255-56 (1994) (describing the history of the movement to amend state constitutions by adding victim's rights amendments).

138. FED. R. CRIM. P. Rule 32(b)(4). The federal provision for victim impact statements, as it appears in the amended version of Federal Rules of Criminal Procedure 32(b), reads as follows:

(4) CONTENTS OF THE PRESENTENCE REPORT. The presentence report must contain --

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offence and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed.

FED. R. CRIM. P. 32 (b)(4)

popular support for the death penalty has focused much attention on the participation of victims in capital punishment cases.[139]

The recognition of victim participation in capital jury sentencing by the Supreme Court in *Payne* established in Eighth Amendment jurisprudence what was implicit in the criminal justice system for centuries. *Payne* clarified the position that the victims of a crime were entitled to see justice done separate and apart from the legitimate obligation of the community to seek punishment against the offender.[140] Prior to the existence of public prosecution, private methods of punishment were well established customs.[141] Indeed, simple vengeance as a goal of punishment has always had some measure of support.[142] In our contemporary justice system, the accommodation of private vengeance is more difficult to identify. Although, we no longer turn over the murderer to the surviving family members, the

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139. There is little doubt that most Americans support capital punishment in cases involving a murder conviction. A recent poll published by Newsweek magazine in July 1995 reported that only 17% of those questioned opposed the death penalty in all cases. Of the remaining 83% of the population, 31% believed that persons convicted of murder in the course of violent crime and major drug dealing should be executed; 28% of those surveyed indicated that those convicted of brutal murder, mass murder and serial killings should be subject to the death penalty. Tom Morganthau, *Condemned to Life*, NEWSWEEK, Aug. 7, 1995, at 19.

In 1969, the approval rate for capital punishment was 51%. Hazel Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290, 291 (1970). A national Harris poll conducted in 1973 showed that 59% supported the penalty. Louis Harris and Associates, Inc., *The Harris Survey*, New York, New York, June 11 and 14, 1973, CHIC. TRIB. (1973).

140. Ken Eikenberry, *The Elevation of Victims' Rights in Washington State: Constitutional Status*, 17 PEPP. L. REV. 19 (1989) (arguing that the "pendulum" is swinging back in favor of victims).

141. One writer believes that our contemporary legal system has removed individual justice through vengeance from the criminal process. She writes, "[o]n an individual basis, the vendetta and feud have been outlawed. They are deemed atavistic relics of more barbarous ages: men and women are supposed to refrain from taking vengeance on their enemies no matter what the provocation and instead turn to the law for justice and satisfaction." LOIS G. FORER, A RAGE TO PUNISH 97 (1994). Forer's observation does not, however, conform to the current desire of victims to participate. If the only way a victim may express their desire for revenge is within the courthouse walls, then victim impact information becomes the only alternative to private vengeance if a victim is to be heard individually at all. For many victims, a response from the prosecutor, acting as a representative of the people, is woefully inadequate to satisfy their sense of justice.

142. It has been said that the public demand for the death penalty, as public vengeance or retribution, has gained new respectability. William P. Barr, U.S. Attorney General under the Bush Administration, declared that a deserved execution creates "a moral satisfaction in the community, and I think that's justified." *Id.* at 101.

victim's concern for personal vengeance is not totally ignored in our public prosecution system.

Indeed, victim participation as a vehicle for recognition of private vengeance in the system is well illustrated by a statement adopted as part of the victim's task force report.[143]

Although the means by which private vengeance is taken into account by the use of victim impact information may be subtle, the objective is clear. The goal is to enhance the punishment of the offender.[144] Even if that punishment is the ultimate sanction of death.[145] The legal, social and moral forces of the vengeance driven, victim participation model of imposing punishment cannot be ignored.

Proponents of a victim participation model have advanced many compelling arguments. Many of those arguments were identified throughout the opinions of the Justices joining the majority in *Payne*.[146] Legal and historical considerations alone, however, only tell part of the story of the victims right movement. Emotional considerations and recognition of the victim's personal suffering play a major role in understanding why the victims rights movement demands the need for direct victim participation. One commentator has noted that the victims rights movement attempts to respect

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143. TASK FORCE FINAL REPORT, *supra* note 120, at 78.

> The goal of victim participation is not to pressure justice, but to aid in its attainment. The judge cannot take a balanced view if his information is acquired from only one side. The prosecutor can begin to present the other side, but he was not personally affected by the crime or its aftermath, and may not be fully aware of the price the victim has paid. It is as unfair to require that the victim depend solely on the intercession of the prosecutor as it would be to require that the defendant rely solely on his counsel.

Id.

144. A principal justification for capital punishment has been to impose retribution for the criminal act. Retribution and vengeance are closely linked with vengeance being more personal to the victims. One of my colleagues has written, "[r]etribution, or just deserts, seeks to punish an offender for the act committed commensurate with the harm inflicted and the moral wrongfulness of the act. Retribution is retrospective in that it punishes for what was done without any regard to possible future benefits arising out of the punishment." Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 162-63 (footnotes omitted) (1995-96). It is often difficult to tell whether victims or victims' groups advocate retribution, vengeance, or both.

145. *See supra* notes 141-42.

146. *See supra* notes 54-90.

> subjective experiences and feelings of victims and for their need to tell their own stories. There is also a calculated judgment that the sentencer who hears from the victim or the victim's family will find the victims suffering more reason to hold the defendant responsible and thus will sentence more stringently.[147]

Some have gone so far as to suggest that the victim impact statement marks the resurgence of vengeance by victims and families through the criminal justice system since direct victim participation in the courtroom provides an alternative to vigilante justice.[148]

All victim participation, however, is not motivated by vengeance. Two compelling reasons unrelated to retribution are frequently advanced by victims groups. First, that participation in the process helps the victim regain a sense of control over their lives.[149] This "self help therapy" is a favorable alternative to simply feeling vulnerable and devastated by the effect of the criminal act on one's life. Second, victim participation is said to enhance the efficiency of the criminal justice system through increased victim participation and thus encourages future involvement of victims in solving crime.[150]

Notwithstanding the concerns for more balance in the system and the therapeutic value of victim participation, it is difficult to separate the

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147. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1416 (1993).

148. *See* Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 77, 92-93 (1992). All do not agree that victim participation has a healing or therapeutic effect. "Vengeance and anger are intertwined, and while victims' anger at the criminal who victimized them is justifiable, vengeance as a manifestation of that anger has a questionable psychological value to the victim." Michael I. Oberlander, Note, *The* Payne *of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1653 (1992). *See* also Henderson, *supra* note 112, at 994-95.

149. Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 504 (1986); Oberlander, *supra* note 148, at 1624-25.

Roberta Roper, one of the nation's leading victims rights advocates, has noted that "[w]hen you become a crime victim, all the controls in your life are gone. But letting victims make choices returns some of the control." Patrick McGuire, *Fighting for the Rights Cause*, BALTIMORE SUN, February 28, 1994, at D1, D2.

150. McLeod, *supra* note 149, at 506. The routine disregard for victims and witnesses in the process, even scheduling matters, has unfortunate consequences. For example, a first-year law student in my class who was a crime victim requested two excused absences because she was summoned as a witness in a criminal case. She was frustrated by the prosecutor's last minute contact and numerous changes in the court date. After her experience in that case, she said that the lack of efficiency in the system would make her reluctant to participate in the future.

demands for increased victim participation from the desire for proportional retributive punishment. All else being equal, many still embrace the view that punishment should be proportionally allocated according to the harm inflicted by the wrongdoer.[151] A logical extension of allocating adequate punishment in comparison to the harm caused by an offender supports the conclusion that in cases of capital murder the surviving victim's desire for the defendant to be executed must be considered. To do otherwise would jeopardize the public prosecution system's effort to retain its legitimate place in our law enforcement scheme. Thus, it has been said that "capital punishment for murder exerts a moral influence by indicating that life is the most highly protected value."[152] It would seem that if it is legitimate that a death penalty exists at all,[153] it should be the legally recognized substitute for private vengeance. That is, victim impact should be considered as part of a system of public punishment which is an adequate substitute for citizens taking matters of punishment into their own hands.[154]

Proponents of capital punishment fervently contend that "society has not only the right, but the affirmative duty, to enact the supreme penalty from foul and vicious killers."[155] The public has a desire to see severe punishment for serious crimes. This phenomena is referred to by one observer as "the boundless outrage that generates demands for boundless retribution."[156]

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151. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 34 (1987).

152. Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 967 (1966).

153. For arguments citing reasons for opposition to capital punishment, see *infra* notes 287-92.

154. Even opponents of capital punishment can understand and sympathize with the pain that causes many loved ones of murder victims to call for the death of the killer.

> In some ancient societies, it was left to the families of the dead person to exact a price for the wrong that had been done to them—whether that price was an economic penalty or "a life for a life." Punishment by the state is, in an essential way, a substitute for personal vengeance. It was meant not only to replace it, but to supersede it.

MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 34 (1993).

155. FRANK G. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 18 (1978). Oliver Wendell Holmes, Jr. once commented that, "[i]f people would gratify the passion of revenge outside of the law, if law did not help them, the law has no choice but to satisfy the craving itself . . . ." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (Little, Brown & Co. 1963) (1881).

156. SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 289 (1993).

Even without conclusive evidence that capital punishment deters crime,[157] many people desire that it remain an option. Some citizens believe that the penalty is at least necessary to establish that some behavior is intolerable. Without the penalty, it has been argued that victims will lose confidence that someone will "act on their behalf . . . ."[158] The criminal justice system could lose its power as the only legitimate authority to enforce the law. For example, one writer fears that "[a] society that is unable to convince individuals of its ability to enact atonement for injury is a society that runs a constant risk of having its members revert to wilder forms of justice."[159]

With violent crime on the rise, most people are unlikely to stop pressuring the justice system to punish offenders severely or execute them when it seems appropriate. In such a climate it is certainly naive to suggest that victims of homicide or other violent crimes would desire, for the sake of the criminally accused, to abandon their participation in the sentencing process.

As one commentator has observed,

> [t]he average citizen is not minded to become a killer; nor does he lose much sleep over the possibility of being falsely accused of murder, such situations being rare. What he is worried about is becoming a victim. As crime has proliferated in this country, the average citizen has watched the statistical chances of becoming the victim of violent crime grow drastically, and he does not like it.[160]

As crime has increased it is not illogical to believe that the trend for a more active role of the victims will increase. Political pressure on judges, prosecutors and other elected officials to recognize the need for victims to participate in punishing the offender will continue to have a profound effect on all aspects of the criminal justice system.

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157. Whether the death penalty has a deterrent effect has lead to considerable debate. *See, e.g.*, Isaac Erhlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975) (arguing the deterrent effect of capital punishment). *But* see WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 137-47 (1974) (arguing the absence of deterrence and criticizing Erhlich's results).

158. JACOBY, *supra* note 156, at 5.

159. *Id.* at 10.

160. CARRINGTON, *supra* note 155, at 20.

IV. A CRITIQUE OF *PAYNE* AND THE PROBLEMS IT PRESENTS

Despite the compelling case that can be made for victim participation and the obvious political muscle which supports initiatives to increase and protect victim participation, the *Payne* decision presents several challenges that cannot be ignored by the courts for very long. The Supreme Court's decision in *Payne* has opened the door to victim participation in capital jury sentencing and has not placed many tangible limits on that participation. *Payne* has made it clear that the impact on the victim's family in a homicide case may be considered by a sentencing jury on the theory that it is simply relevant to evaluating the appropriate punishment.[161] As a practical matter its general relevance and admissibility is, for the most part, a closed legal question.[162] Other than a possible Due Process challenge to some potential, but as of yet, unspecified inflammatory use of victim impact information[163] and a conspicuous silence on whether a victim could actually recommend a sentence of death to the jury,[164] the *Payne* opinion places few limitations on what a victim may say. Furthermore, the question of who qualifies as a "victim" presents problems of its own.[165] For example, should the testimony be limited to immediate family or, in absence of a statute, could anyone acquainted with the victim be able to offer testimony about how the crime and the loss of the victim has affected their life?[166]

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161. *See supra* notes 79-82.

162. *See supra* note 111.

163. *See* Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027 (1993).

164. *See* State v. Bolton, 896 P.2d 830 (Ariz. 1995) (recommendation of sentence by surviving victim can be improper, but was harmless in this case).

165. The Supreme Court opinions on victim impact statements are virtually silent on the scope of those persons who would qualify as appropriate surviving victims. Katie Long, *Community Imput at Sentencing: Victim's Rights, Victim's Revenge,* 75 B.U.L. REV. 187 (1995). *Payne v. Tennessee* does not suggest it should be limited to family members. *Id.* at 199. One commentator has argued that *Payne* supports the proposition that community impact testimony will become a fixture in the criminal justice process. *Id.* at 229. Such an approach would involve testimony of a community representative at the sentencing hearing describing the loss of the victim to the sentencer in terms of loss to the community. *Id.* at 195-96.

166. One court recently interpreting *Booth v. Maryland*, 482 U.S. 496, 505 (1987), described the potential range of victim impact testimony very broadly. *See* Nooner v. State, 907 S.W.2d 677 (Ark. 1995) ("[T]estimony may range from the victim's family to those close to that person who were profoundly impacted by his death . . . ."). However, the trial judge in the celebrated death penalty case of Susan Smith refused to permit a police officer to testify about the emotional impact they experienced when recovering the bodies of her dead children from the water and the impact on people who were around at the time. State v. Smith, No. 94-

It could be argued that everyone in the community is affected by the death of one of its members. Does the language of *Payne* support the notion that co-workers and close friends would be able to offer their reflections on the decency of the victim and how his or her loss will affect the workplace or the community? And if such reflections are allowed, and surviving victims can presumably influence the decision of a jury to impose death, then what result for the person murdered without surviving victims able to offer victim impact? Does absence of spokespersons result in a lesser influence in the criminal justice system?[167] One comment has suggested that such a ranking of victims is a violation of equal protection of the law.[168]

Arguably, if the victim's value to society is truly relevant in sentencing capital defendants, there would be no reason why a prosecutor could not survey all people who knew the victim to obtain the most accurate information on the kind of person the victim was and how valuable the community believed him or her to be.[169] Such cases have yet to come before the Supreme Court but it is likely that a broader definition of victim impact information might be pursued by a prosecutor if a victim was particularly renowned. For example, if a doctor who discovered a cure for AIDS was murdered, the value of his contribution to society certainly adds to the impact of the crime on people beyond his immediate family. Taking the point a step further, what if a researcher was murdered just before she was able to complete the final step in the cure for cancer? Could it not be said

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65-44-906 and 94-65-44-907, 1995 WL 702707, at *8 (S.C. Ct. Gen. Sess. Tr. July 26, 1995)). The South Carolina jury ultimately refused to render a death sentence. Morganthau, *supra* note 139.

167. *Booth*, 482 U.S. at 506.

168. *See* Jonathan Willmott, Comment, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of* Booth v. Maryland *and* South Carolina v. Gathers *and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045 (1990).

169. The majority in *Booth* feared valuing and comparing one life over another. *See supra* note 29. Some commentators argue that since such comparisons are inevitable, mathematic formulas should be devised to accomplish the task. *See* Teree E. Foster, *Beyond Victim Impact Evidence: A Modest Proposal*, 45 HASTINGS L.J. 1305, 1312 (1994) (arguing for use of calibrated scales assigning point value to the loss felt by victim to determine victim level of participation in the punishment, and also suggesting the notion that "all persons have equal worth is irrational and unrealistic . . . ."; *see also* David D. Friedman, *Should the Characteristics of Victims and Criminals Count?:* Payne v. Tennessee *and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731 (1993) (developing a formula of "low value" and "high value" victims in order to establish appropriate punishment for a particular killing).

that all persons who may have benefited from her near completed work are victims who have suffered loss from her death?[170]

The problem of making victim impact information relevant to capital sentencing is that it potentially opens the "Pandora's box" of possibilities for a prosecutor seeking a death sentence. How far can the prosecution push to establish the good character of the victim? Can he submit work performance evaluations, recorded testimonials, funeral eulogies, or even a high school report card, in an effort to demonstrate the loss to the family and the community? May the victim's yearbooks, family photo albums or concert performance tapes be submitted as well? If such material is not prohibited in a capital sentencing proceeding, under *Payne*, absent specific statutory prohibitions, what legal principle prevents such information from being considered?[171]

Whatever the legitimate criticism of the *Booth* exclusion of victim impact evidence may be, the decision at least had the advantage of offering a bright line approach to the appropriate treatment of such information.[172] *Booth* clearly mandated that the admission of such information in a capital case[173] was reversible constitutional error. The rule in *Booth* made it clear all efforts to have the jury overtly consider the worth of individual defendants or

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170. *See* Long, *supra* note 165, at 207-08 (arguing for the variety of ways to view the community as victim).

171. In *Whittlesey v. State*, 665 A.2d 223, 250 (Md. 1995), a ninety-second piano performance videotape of the victim was played to the jury during the sentencing phase. Jamie Griffin, the victim, was a gifted piano player and the videotape was held not cumulative even though his parents testified about his piano playing ability. *Id.* at 250-51. Another court held that there was nothing improper about a prosecutor's argument suggesting what parents and friends "might" have said about the victim. State v. Gregory, 459 S.E.2d 638, 673-74 (N.C. 1995). *See also* Windom v. State, 656 So. 2d 432 (Fla. 1995) (an officer testifying about the death of a fellow officer and its effect on children in the community was improper, but harmless); State v. Scales, 655 So. 2d 1326 (La. 1995) (prosecutor's argument that he could have called "dozens" of victim impact witnesses held not reversible error).

172. The Supreme Court has, in other contexts, announced "bright line" rules to avoid uncertainty. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court issued a "bright line" rule that permitted police to order the driver out of the car even without the officer needing reasonable suspicion to do so. The policy advanced for such a rule was that police should not need to guess about when they could make such a request since serious issues of safety arise in vehicle stops. Such rules add stability to the law and generally lead to uniform conduct. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (if police obtain a warrant, searches will be upheld even if the facts in the warrant do not constitute probable cause).

173. Courts would sometimes avoid the consequences of *Booth* by holding that the victim impact evidence was harmless. *See, e.g.*, State v. Paz, 798 P.2d 1, 15-17 (Idaho 1990), *cert. denied*, 501 U.S. 1259 (1991).

victims would be highly suspect. This reduced the risk that a death sentence would be rendered because of the victim rather than the background of the offender or the crime.[174] The consequence of permitting victim impact information is the risk that the victim and consequences of the crime might dominate the jury's consideration of a death sentence.[175] Sentencing hearings might ultimately evolve into presentations of "the worth of the victim," that would resemble those issues that sometimes arise in tort litigation.[176] Indeed, if the Constitution presents no impediment to the use of victim impact information other than the due process clause, and if such information is considered generally relevant as *Payne* suggests, than there would be no reason that a legislative body could not only permit, but require greater victim participation than is presently recognized in most states.[177]

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174. Zant v. Stephens, 462 U.S. 862, 879 (1983).

175. *See* Elizabeth Anna Meek, Comment, *Victim Impact Evidence and Capital Sentencing: A Casenote on* Payne v. Tennessee, 52 LA. L. REV. 1299, 1310 (1992) ("Even if it was relevant in a particular case, by its nature, [victim impact] evidence is unduly prejudicial.").

176. Valuing life and loss of enjoyment is not only common in tort litigation but in some cases necessary for recovery of damages. In federal law, recovery for loss of the pleasure of living is actionable under § 1983 of Title 42 of the United States Code. An English court required damages be allowed for the "loss of expectation of life." *See* Rose v. Ford, [1937] A.C. 826, 836. Recently, the Supreme Court unanimously held that damages for "loss of the enjoyment of life" were allowable compensation under the Federal Tort Claims Act. Molzof v. United States, 499 U.S. 918 (1992). Such valuation of life has come to be known as "Hedonic Damages." *See* Anderson v. Nebraska Dep't. of Soc. Servs., 538 N.W.2d 732, 739 (Neb. 1995) (hedonic damages are those damages awarded for loss of enjoyment of life, and are measured separate from economic productive value that an injured person would have had); Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985), *aff'd*, 827 F.2d 195 (7th Cir. 1987) (testimony of expert held admissible to assist jury in "determining the most accurate and probable estimate of . . . the hedonic value of [decedent's] life"). Some jurisdictions have developed doctrine which permits recovery on the direct valuation on this type of loss. *See, e.g.*, Rufino v. United States, 829 F.2d 354, 362 (2d Cir. 1987) (comatose plaintiff without cognitive awareness to recover for the "loss of enjoyment of life as separately compensable items of damages"). *See* also Patrick B. Murray, *Hedonic Damages: Properly a Factor Within Pain and Suffering Under 42 U.S.C. § 1983*, 10 N. ILL. U. L. REV. 37 (1989) (arguing the continuing validity of *Sherrod* concerning hedonic damages). Arguably, these doctrines already provides a legally adequate basis to introduce specific evidence of the value of the victim's life and the loss of the enjoyment of that life to the surviving victim and his family, especially in light of *Payne*'s holding that the victim's loss is relevant to sentencing and legislative willingness to permit more victim participation. *But see* Wilt v. Buracker, 443 S.E.2d 196 (W. Va. 1993), *cert. denied*, 114 S. Ct. 2137 (1994) (testimony of expert regarding hedonic damages not permitted); Southlake Limousine & Coach, Inc. v. Brock, 578 N.E.2d 677 (Ind. App. 1991) (rejecting recovery of hedonic damages).

How far individual states will broaden the victim participation remains to be seen. A state may place limits on those eligible to participate in capital sentencing proceedings, but reforms that would limit victim participation are unlikely to garner much political support.[178]

The problem, however, only begins with determining the categories of victims eligible to participate. It is still unclear what victims can tell the jury about the deceased,[179] how much detail the survivors can use to describe the

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177. In fact, political support for victim's rights reform come from victim's rights advocates who have succeeded in passing some form of victim impact legislation in 49 jurisdictions, permitting victim participation in both capital and noncapital contexts. *See* Carrie L. Mulholland, Note, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 MO. L. REV. 731 n.74 (1995) (collecting victim impact statement statutes currently in effect).

In April, 1996, a victim's Bill of Rights constitutional Amendment was introduced to Congress which would provide as follows:

> Victims' Rights Constitutional Amendment
>
> Section 1. To ensure that the victim is treated with fairness, dignity, and respect, from the occurrence of crime of violence and other crimes as may defined by law pursuant to section two of this article, and throughout the criminal, military, and juvenile justice processes, as a matter fundamental rights to liberty, justice, and due process, the victim shall have the following rights: to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender; to be heard at any previously negotiated plea, or a release from custody; to be informed of any release or escape; and to a speedy trial, a final conclusion free from unreasonable delay, full restitution from the convicted offender, reasonable measures to protect the victim from violence or intimidation by the accused or convicted offender, and notice of the victim's rights.
>
> Section 2. The several States, with respect to a proceeding in a State forum, and the Congress with respect to a proceeding in a United States forum, shall have the power to implement further the rights established in this article by appropriate legislation.

142 CONG. REC. S3795 (daily ed. April 22, 1995) (statement of Senator Kyl).

178. One victim impact statute authorizes that "a victim who is incapacitated or otherwise incompetent shall be represented by a parent or present legal guardian, or if none exists, by a representative designated by the prosecuting attorney without court appointment . . . ." WASH. REV. CODE § 7.69.040. Under the same statute, a survivor is defined as a "spouse, child, parent, legal guardian, sibling or grandparent." *Id.* § 7.69.020.

179. *Payne* gives no guidance on what a victim may say, but implicit in its overruling *Booth* is the suggestion by the Supreme Court that the extensive victim impact testimony given in *Booth* might be constitutionally permissible. *See Booth*, 482 U.S. 496, 509-515 (1987).

effect of their loss,[180] and how the defendant can rebut such evidence in a capital jury sentencing.

V. VICTIM IMPACT AND CONFRONTATION: THE BATTLE NOT WORTH WINNING

There is no question that a capital defendant has the right to attack the accuracy of information that is offered against him at his sentencing hearing.[181]

In 1977, the Supreme Court decided *Gardner v. Florida*,[182] which recognized the right to due process and confrontation in capital sentencing proceedings.[183] In *Gardner*, the Supreme Court overturned a capital sentence because the basis of a pre-sentence report was not made available to the defendant in the time for him to rebut.[184] The plurality opinion reasoned that imposing a death sentence "on the basis of information which [the defendant] had no opportunity to deny or explain," violated due process.[185] In the years following *Gardner*, the Supreme Court decided several cases which reaffirmed that principal. In *Ake v. Oklahoma*,[186] the Court held that where the state intends to present psychiatric evidence in a capital sentencing proceeding the indigent defendant was entitled to the assistance of a psychiatrist for his defense in order to provide him "a meaningful opportunity to present a complete defense."[187] Most recently, the Supreme Court in *Simmons v. South Carolina*,[188] held that a capital defendant was entitled to a jury instruction explaining the availability of the sentencing

180. An example of one statute that provides a broad scope of potential victim impact information permits "the victim or a survivor, individually or with the assistance of the prosecuting attorney . . . [to include] but is not limited to information assessing the financial, medical, social, and psychological impact of the offense . . . ." WASH. REV. CODE § 7.69.020(4).

181. Townsend v. Burke, 334 U.S. 736 (1948) (under the Due Process Clause an offender has the right to attack information at his sentencing that is inaccurate). The American Law Institute's Model Penal Code Section on Capital Punishment, while not endorsing capital punishment, suggested that any capital statute provide that the defendant's counsel be accorded a fair opportunity to rebut evidence offered by the prosecution at a death penalty sentencing proceeding. MODEL PENAL CODE § 210.6(2) (1985).

182. 430 U.S. 349 (1977).

183. *Id.* at 350-51.

184. *Id.* at 353.

185. *Id.* at 362.

186. 470 U.S. 68 (1985).

187. *Id.* at 83-87.

188. 512 U.S. 154 (1994).

alternative of life without the possibility of parole, in order to rebut the State's suggestions that the defendant would be a danger in the future. Embracing *Gardner*, the Court's opinion reasoned that "the Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain."[189]

Of course, one of the principle vehicles to challenge evidence presented by the state is the right to confrontation through cross-examination guaranteed by the Sixth Amendment.[190] The right to cross-examination, described as "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,"[191] was been made applicable to the states through the Fourteenth Amendment.[192] Accordingly, the constitutional jurisprudence suggests that a capital defendant has a right to attempt to confront victim impact information at a capital sentencing proceeding.[193]

The right to confront does not, however, necessarily support the wisdom of such a strategy. Indeed, one might accurately describe the enterprise of attempting to attack the grief of a surviving victim or the background of a deceased victim as a classic example of "Hobson's Choice."[194] The law may provide the basis to challenge the victims, but in most cases, a defense attorney has no true choice but to accept what has been offered. Confronting victims by cross-examination might anger the sentencing jury.[195]

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189. *Id.* at 159 (citing *Gardner*, 430 U.S. at 349).

190. As it relates to confrontation, the Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

191. Pointer v. Texas, 380 U.S. 400, 405 (1965).

192. *Id.* at 406.

193. *See generally* Davis v. Alaska, 415 U.S. 308, 318 (1974) (cross-examination is available to demonstrate bias and reliability of a witness and is a fundamental right).

194. The phrase "Hobson's Choice" originates from the writings of the English poet and historian John Milton (1608-74). The expression refers to Thomas Hobson, a Cambridge carrier and liveryman who had a "custom of letting out his horses in rotation, and not allowing his customers to choose among them." THE OXFORD COMPANION TO ENGLISH LITERATURE 465 (Margaret Drabble ed.) (5th ed. 1985).

195. In the context of victim impact information the opportunity to challenge the character of the deceased or the impact of the crime on the victim in all but the most unusual circumstances meets the traditional definition of Hobson's Choice. *See supra* note 194. That is: "an apparent freedom to take or reject something offered when in actual fact no such freedom exists: an apparent freedom of choice where there is no real alternative: the forced acceptance of something whether one likes it or not . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1076 (unabridged. ed. 1966).

The *Booth* Court addressed the issue of confrontation in its ill-fated decision when it observed that "the defendant would have the right to cross-examin[ation] . . . but he rarely would be able to show that the family members have exaggerated the degree of sleeplessness, depression, or emotional trauma suffered."[196] The Court also noted that an attack on the deceased's character was equally unappealing.[197]

Consider an example of the problems of confronting victim impact testimony that arose in the case of *Lodowski v. State*.[198] *Lodowski*, a Maryland death penalty case that proceeded *Booth* in addressing the issue of victim impact, involved the robbery and murder of two men at a suburban Washington D.C. mini mart.[199] One of the victims was Minh Huong Phamdo. Several witnesses offered victim impact statements including Minh's 74-year-old grandmother.[200] In describing her loss in religious terms the victim impact statement expressed her belief "that when she passed away her soul would wander aimlessly for her first grandson [Minh] is not on earth to worship her. Any other grandson who would take over the duty of ancestor wor[s]hipping would not be as effective as Minh, the first born."[201] Although the Court of Appeals reversed the death sentence on other grounds[202] it analyzed the legislative intent in permitting the consideration of victim impact evidence.[203] In dicta intended to guide the lower court on remand at resentencing the Court of Appeals said, "[w]e see no constitutional impediment to the legislature's determination that victim impact statements are relevant in a capital sentencing proceeding, and we bow to the legislative judgment that such statements are relevant."[204] However, in an opinion that concurred in the judgment, but disagreed with the victim impact dicta, Judge Harry A. Cole pointed out the confrontation dilemma When he queried: "How can [the defendant] challenge any testimony that expresses bereavement, religious harm, or infant sorrow? The defendant must remain mute while the victim's family pleads for its 'pound of flesh.' "[205]

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196. *Booth*, 482 U.S. at 506.

197. *Id.* at 507.

198. 490 A.2d 1228 (Md. 1985).

199. *Id.* at 1231.

200. *Id.* at 1269 (Cole, J., concurring).

201. *Id.*

202. The court remanded for a new sentencing hearing based upon the trial court's improper denial of a motion to suppress Lodowski's statement. *Id.* at 1258.

203. *Id.* at 1252-1257.

204. *Id.* at 1253.

205. *Id.* at 1277 (Cole, J., concurring).

The problem posed by the Judge Cole in *Lodowski* is sobering. There is virtually no way for the defendant to attack the claims of family members who assert their measure of emotional pain and surely no way to examine the validity of the effect on one's afterlife.[206] For a defense lawyer representing the capital defendant, questioning a grieving family member on either matter would be suicide in most cases.

One commentator has suggested that if approached with caution, the defense may consider contacting the family of the deceased in an effort to mitigate victim impact evidence.[207] Professor Randall Coyne argues:

> Although a matter of extreme delicacy, the defense should consider attempting to establish contact with the victim's family. The funeral director may be able either to identify an approachable family spokesperson or to establish contact with a priest, minister, or rabbi assisting the family during their tragedy. Although the family's initial reaction may be to avoid any contact with the defense attorneys, one should not automatically assume that all family members will seek to have the client killed.[208]

There are at least four problems with such an approach. First, as Professor Coyne recognizes, the victim's opinion, that death is not an appropriate sentence for the defendant, may not even be admissible.[209]

Second, it is virtually impossible to cross-examine a bereaved victim. How does one go about questioning a victim on matters regarding the extent of the grief and suffering without generating more sympathy for the victims? The result would be to move ones' client closer to execution. Even though it may be difficult for a victim to substantiate early morning stomach aches and late night tears, what defense attorney would dare attempt to establish the inaccuracy of such claims on cross-examination? Only in a case where the

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206. *See supra* note 202.

207. Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589 (1992).

208. *Id.* at 613.

209. Professor Coyne notes that *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), found inadmissible testimony of one of the victim's relatives' that she did not believe in the death penalty. *See* Coyne, *supra* note 207, at 618-19, 622. Other courts have agreed with this conclusion. *See* State v. Pirtle, 904 P.2d 245 (Wash. 1995) (a victim's testimony in opposition to the death penalty is not mitigating, nor is it victim impact testimony, rather it is an inappropriate recommendation of sentence).

victim is hopelessly unworthy of sympathy could such an effort even be contemplated.[210]

Third, most victims are likely to be irritated by defense efforts to contact them. Obviously, the obligation of the attorney to represent the capital defendant places the loyalty of the attorney at odds with the victim's desire for the defendant to be punished.[211] The victim will no doubt understand the attorney's role and may refuse to cooperate and at worst, the victim may well become hostile and be more likely to demand more severe punishment. At least one study has suggested this possibility.[212]

A final problem generated by attempts to contact the victim is the very real risk that the defense lawyers will become part of the victim impact against their own client. It is certainly not unreasonable to suggest that a victim might become upset about the attempt of a defense attorney or his representatives to contact the victim through a funeral director or a clergyman as has been suggested by Professor Coyne.[213] The attorney's well intentioned effort to diligently prepare his case may result in an embarrassing mention of his efforts to contact the family by a victim in the victim impact statement. Surely, attempts to approach the victim will, in most cases, place an attorney representing a capital client between Scylla and Charybdis.[214]

Even more troubling is Professor Coyne's suggestion that victim impact should be confronted by a direct comparison of the victim's life to that of the defendant. He asserts: "Rebutting victim impact evidence requires a

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210. *See* Payne v. Tennessee: *An Eye for an Eye and Then Some*, 25 CONN. L. REV. 205, 255 (1992) ("At capital sentencing, the jury has already convicted the offender of murdering the victim. By attempting to impeach the testimony relating to the victim or impugn the victim's character, the offender will only incense the jury.").

211. Obviously an attorney's obligation to his client must supersede all other concerns that an attorney may have for the victim of the crime. "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." Von Moltke v. Gillie, 332 U.S. 708, 725-26 (1948) (footnotes omitted).

212. *See* John Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 328 (1982) ("It may be that in the process of attempting to prove the client's innocence the defense counsel aggravates tensions between the victims and accused.").

213. *See supra* note 208.

214. In Greek mythology, two immortal monsters who tormented Greek mariners, particularly the mythical character Odysseus. *See* HOMER, THE ILIAD AND THE ODYSSEY (Samuel Butler trans., & Robert Maynard Hutchins ed., 1952). The monsters were said to be positioned close to each other in the Straits of Messina in the Western Mediterranean making it difficult to navigate a vessel between them. The monsters give poetic expression to the dangers one faces when going into uncharted waters in an effort to rebut victim impact.

thorough investigation of the background and life of the victim. If faced with overwhelming evidence that the deceased had a loving family, the defense attorney should compare her client's life to the victim's life."[215]

Such comparisons are wrought with danger as Justice Powell suggested in his majority opinion in *Booth*.[216] As Powell noted:

> The prospect of a "mini-trial" on the victim's character is more than simply unappealing; it could well distract the sentencing jury from its constitutionally required task—determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime.[217]

Since in a capital sentencing the defendant has already been convicted of murder[218] the comparison of his life to the life of almost any victim will be dreadfully undesirable. Indeed, defense counsel may be unfairly compelled to abandon all confrontation of the victims in an effort to have the jury reflect as little on the suffering of the victims as possible or to recommend to his client that there should be no jury at all.

VI. GUESS WHO'S COMING TO DINNER? RACIAL DISCRIMINATION AND THE UNINVITED CONSEQUENCES OF VICTIM IMPACT INFORMATION

The issue of racial discrimination against African Americans in capital sentencing has presented one of the most perplexing problems of criminal justice.[219] Of course, problems in discrimination in the criminal justice

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215. Coyne, *supra* note 207, at 614. Although I have strong reservations about a strategy that would force a confrontation of character between the defendant and the surviving victims, Professor Coyne is quite correct that in the rare instance when an attorney would engage such a battle, he not do so blindly. More important, it may be that the nature of the victim impact information received by counsel prior to trial allows the defendant and counsel to agree that such a contest is best if held in front of a judge rather than a jury.

216. *See Booth v. Maryland*, 482 U.S. 496, 506-07 (1987).

217. *Id.* at 507.

218. *See supra* note 210.

219. For two particularly insightful reviews of the problem of racial discrimination in capital punishment, see Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 439-43 (1988) (suggesting that jurors are influenced by the race of both the victim and the defendant) and Randall L. Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (discussing historical disparities in punishment between white and black).

system have not been confined exclusively to persons of African descent.[220] The problem, however, has been more acute when African Americans are defendants in capital cases and, as a result, the statistical data substantiating the existence of racial bias is virtually unassailable.[221] Even the Supreme

220. The measure of justice received in this country has often been linked to racial, ethnic or religious prejudice. In Maryland in 1717, laws were enacted that prohibited not only blacks, but Indians and Mulattos from testifying in any case in which a Christian white person was concerned. These provisions applied to such persons whether they were slave or free. JEFFREY R. BRACKETT, THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY 191 (1891) (Herbert B. Adams ed. 1969). Another Maryland report commissioned in the early 1960s observed that in the years 1936-1961 of the 122 persons sentenced to death in Baltimore City about 80 percent of those executed were African-American. LEGISLATIVE COUNCIL COMMITTEE, REPORT ON CAPITAL PUNISHMENT, at 41 (October 3, 1962) *cited in* THE REPORT OF THE GOVERNOR'S COMMISSION ON THE DEATH PENALTY: AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978-1993 (November 1993) (on file with Professor Edward A. Tomlinson, Faculty Reporter to the Governor's Commission, at the Thurgood Marshall Law Library at the University of Maryland School of Law) [hereinafter GOVERNOR'S COMMISSION REPORT].

In Virginia during the early 1800's, negroes were not even permitted to testify in murder trials against a white defendant. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1239-40 n.142 (1993).

In the mid-1800s a California court overturned the conviction of a white man charged with murdering a Chinese woman since the testimony suggesting guilt was supported in part by the testimony of a Chinese witness. People v. Hall, 4 Cal. 399 (1854). The court reasoned that the statute preventing "blacks," "mulattos," and Indians from testifying against whites also applied to Chinese since the statute was designed to protect whites from testimony of all nonwhites. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1291 n.241 (1993).

In 1913, the oft-noted case of Leo Frank occurred. Frank, the Jewish victim of a Georgia mob, was falsely accused of murdering Mary Phagan, a thirteen-year-old girl who worked for him in an Atlanta factory. That Frank was Jewish arguably played a role in the decision of the mob to act. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 191 (1993).

Native Americans were victims of the greatest single day of mass government-sanctioned execution in United States history. A military commission tried nearly 400 Dakota Indians and executed 38 after a small war between the Dakotas and white settlers. *Id.* at 97 (citing Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Justice*, 43 STAN. L. REV. 13 (1990)).

221. Even the Supreme Court has recognized that racial discrimination "still remains a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not real or less pernicious." Rose v. Mitchell, 443 U.S. 545, 558-59 (1979). *See also* McClesky v. Kemp, 481 U.S. 279, 286 (1987) (citing a study conducted by Professors David C. Baldus, George Woodworth and

Court in *McCleskey v. Kemp*[222] could not ignore the obvious statistical disparity, particularly when the victim is white and the defendant is African-American.[223] In *McCleskey*, a sharply divided Supreme Court held 5-4 that despite the racial disparity generated by the statistical studies, McCleskey, an African American, could not make out a sufficient claim to invalidate his death sentence on equal protection grounds.[224]

Ironically, Justice Lewis Powell, who not only authored the Court's opinion in *McCleskey*, but who also crafted the *Booth* decision, reported in a 1991 interview that *McCleskey* should have been decided differently and that he would no longer favor capital punishment if he were still on the Supreme Court.[225] The controversy race and capital punishment has generated has led to recent unsuccessful efforts to pass laws in both federal and state legislatures to mitigate the effect of discrimination by placing the burden on the prosecution to show that seeking a death sentence is not based on racial considerations.[226]

Charles Pulaski); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 39 (1984).

222. 481 U.S. 279 (1987).

223. *Id.* at 286-87.

224. *Id.* at 299 (*McClesky* also challenged his sentence on 8th Amendment grounds).

225. In an interview with his former law clerk, Professor John C. Jeffries, Jr. of the University of Virginia Law School, Justice Powell was asked whether he would change his vote in any case. He responded:

"Yes, McCleskey v. Kemp,"

"Do you mean you would now accept the argument from statistics?"

"No, I would vote the other way in any capital case."

"In 'any' capital case?"

"Yes"

"Even *Furman v. Georgia*?"

"Yes, I have come to think that capital punishment should be abolished."

JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. AND THE ERA OF JUDICIAL BALANCE 451-52 (1994).

226. A federal bill known as the Racial Justice Act (H.R. 4017), intended to amend title 28 of the United States Code and to prevent racial discrimination in capital sentencing, was reported on favorably by the House of Representatives on March 24, 1994. H.R. 4017, 103 Cong., 2d Sess. (1993). The report's purpose clause stated that the law would allow a court consider evidence that established "a consistent pattern of racial discriminatory death sentences in the sentencing jurisdiction, taking into account the nature of the cases being compared, the prior records of the offenders, and other statutorily appropriate non-racial characteristics." H.R. REP. NO. 103-458, at 1 (1993). The relevant provisions of the statute provided that:

§ 2921. Prohibition against the execution of a sentence of death imposed on the basis of race

(a) IN GENERAL. No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race.

(b) INFERENCE OF RACE AS THE BASIS OF DEATH SENTENCE. An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.

(c) RELEVANT EVIDENCE. Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were, at the time pertinent under subsection (b), being imposed significantly more frequently in the jurisdiction in question—

(1) upon persons of one race than upon persons of another race; or

(2) as punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(d) VALIDITY OF EVIDENCE PRESENTED TO ESTABLISH AN INFERENCE. If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for the inference. Such evidence must take into account, to the extent it is compiled and publicly made available, evidence of the statutory aggravating factors of the crimes involved, and shall include comparisons of similar cases involving persons of different races.

(e) REBUTTAL. If an inference that race was the basis of a death sentence is established under subsection (b), the death sentence may not be carried out unless the government rebuts the inference by a preponderance of the evidence. Unless it can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty, the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty.

Id. at 12-13.

The federal provision failed in the Senate. 1994-95 CONG. Q. ALMANAC—1994, 103d Cong. (2d Sess.) 282 (1995). Among the criticisms of the proposed law was the notion that the act offends notions of individual justice. The dissenting views to H.R. 4017 argued that the criminal justice process is designed to allow the jury to carefully consider a number of factors—which do not easily lend themselves to statistical quantification. *Id.* at 14-17.

> The purpose of individualized justice is to ensure that each defendant has his or her case carefully decided on its own merits—without regard to other defendants. The Racial Justice Act would create a system of statistically proportional justice where the penalty received would depend on ones [sic] membership or the membership of ones [sic] victim in a particular racial class.

Id. at 16.

When the victims are white, historically a black defendant is treated more harshly.[227] Throughout the post-civil war era African Americans were exposed to "summary justice" in the form of lynchings.[228] A primary motivation for this form of violent proceeding was the nature of the crime as it related to the status of the victim.[229] This history of bias may be the unwelcome factor in the continuing statistical disparity that exists in the imposition of capital punishment. Some studies demonstrate that African Americans do commit crime at a higher rate compared to their relative numbers in the population.[230] But even that fact does not explain the profound effect that the race of the victim[231] has in predicting who will be executed and who will be spared.[232] Several studies conducted during the

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227. A 1849 Virginia law made it a crime to use "provoking language or menacing gestures" to a white person. The law applied to both free blacks and slaves. Code Va. 1849, tit. 54, chap. 200, § 8, p. 754 (cited in FRIEDMAN, *supra* note 220, at 90 & n.28).

228. JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 439 (3d ed. 1967). Between 1889 and 1922, there were 3,436 lynchings in the United States. *Id.* at 488.

229. Lynching as a form of alternative system of justice has been explored by legal scholars. One scholar has commented that the race of the victim of the alleged offense (in most cases white women) motivated vigilante action from those too angry or too impatient to wait for the judicial process to work. Professor Lawrence M. Friedman writes:

> [T]he mob decided that honor *demanded* direct action—the honor of the white woman, her family, and the community. The lynching was part of an "unwritten code." Southerners distrusted the state, and preferred, in these cases, "personal justice." They "believed strongly that community justice included both statutory law and lynch law"; indeed, lynch law "was perceived as a legitimate extension of the formal legal system."

FRIEDMAN, *supra* note 220, at 190 (citing ROBERT P. INGALLS, URBAN VIGILANTES IN THE NEW SOUTH: TAMPA 1882-1936 4 (1988)). For another excellent review of the complicated question of the role lynching played in the system of punishment in America, see W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH (1993).

230. JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 461 (1985). Blacks are overrepresented by a factor of four to one among persons arrested for violent crimes (and represent about 1/2 of those arrested for murder and rape). *Id.*

Ironically, African-Americans are overwhelmingly more likely to be the victims of homicide. The overall rate at which black men are killed is more than six times greater than the rate at which white men are killed, and for black males age 25-29 the rate of homicide is over seven-times higher. *Id.* at 463-65. In 1994, blacks represented 1,432 per 100,000 prisoners, while whites only registered a rate of 203 per 100,000. BUREAU OF JUSTICE 1994 STATISTICS *cited in* Bernard Gauzer, *Life Behind Bars*, PARADE, Aug. 13, 1995 at 4.

231. *See supra* note 219.

232. MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 77 (1973). One white lawyer made the following observations regarding the issue of race and punishment in the Upper South in a 1940 letter:

twentieth century overwhelmingly support the existence of this racial bias in punishment. For example, "Texas Courts indicted some 500 white men for the murder of blacks in 1865 and 1866, but not one was convicted."[233] About seventy-five years later, in Florida in 1940, forty-five out of forty-eight blacks were sentenced to death for the rape of white women, while no white men were sentenced to death for the rape of black women.[234] Similarly, when Marvin Wolfgang studied the relationship between rape as a capital offense and the race of the victim as it relates to capital punishment, he found that "during the twenty year period from 1945 to 1965 in seven southern states . . . there has been a systematic, differential practice of imposing the death penalty on blacks for rape and, most particularly, when the defendants are black and their victims are white."[235]

Of course, all of these disparities were not created by sentencing juries alone, but much of what the statistics may indicate is unarticulated, unconscious racial bias. Justice Harry Blackmun recently addressed these concerns in *Callins v. Collins*:

> The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall

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(June 19, 1940): "When the cases involve no such issues [on the race question] but are merely cases, I have noted that cases between Negro and Negro are handled somewhat differently than cases between white and white. I mean a spirit of levity, an expectation of something 'comical' appears to exist. The seriousness in the white vs. Negro case is decidedly lacking. As you know it is a rare case indeed in which a Negro who has murdered a Negro receives the extreme penalty, either death or life imprisonment here, regardless of the facts. Only the other day in a local case a Negro who murdered another with robbery as a motive, a charge that would have been as between white and white, or Negro and white victim, good for the electric chair, was disposed of by a jury with a 15 year sentence. The punishment as between Negro and Negro, as distinguished from white vs. white, or Negro vs. white victim, is decidedly different and clearly shows the racial approach to the question. In short the court-room feeling is that the Negro is entirely inferior, with punishment for crimes by him against his own kind punished with less punishment than when the white man is involved."

ARNOLD ROSE, THE NEGRO IN AMERICA 180 n.8 (1944).

233. ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION 204 (1990).

234. *Meltsner*, *supra* note 232, at 76-77.

235. MARVIN E. WOLFGANG, RACIAL DISCRIMINATION IN THE DEATH SENTENCE FOR RAPE, *in* BOWERS, supra note 157, at 109-113 (1974). *See* also Coker v. Georgia, 433 U.S. 584 (1976) (invalidating capital punishment for rape when no homicide is committed in part because of disparities regarding the race of the victim).

> live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death . . . .[236]

Blackmun went on to discuss the racial statistics offered in *McCleskey*. He relied on Justice Brennan's dissent, which noted that unrefuted studies showed that blacks who kill whites are sentenced to death "at nearly 22 times the rate of blacks who kill blacks . . . ,"[237] characterizing the evidence of racial prejudice in *McCleskey* as "staggering."[238]

The problem identified in *McCleskey* has not abated. One Georgia study indicated from 1973 to 1990 African Americans comprise 65 percent of murder victims, while whites comprise 35 percent. The death penalty was sought in 85 percent of the murder cases that involved white victims, but only in 15 percent of those involving black victims.[239] The unexplained racial disparity that has existed in capital punishment cannot be ignored. The link between racial discrimination and the possibility that a jury will impose death because its members identify with the victim rather than the defendant is always a possibility. For example, if a jury has few or no African Americans, and there is an African American defendant a death sentence may be more likely. More jurors may identify with the victim because of characteristics the jury perceives it shares with the victim.[240]

It is, of course, difficult to generalize about how juries go about the business of imposing death. One thing, however, is certain: the racial statistics haunt the capital sentencing process in America.[241] The existence

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236. Callins v. Collins, 510 U.S. 1141, 1153 (1992) (Blackmun, J., dissenting).

237. *Id.* (quoting McClesky v. Kemp, 481 U.S. 279, 327 (1987)).

238. *Id. See also* HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES 239-40 (1993) (citing a section of the "Chattahoochee Report" entitled "Victims' Families: A Contrast in Black and White" at 3).

239. *Id.*

240. The American Bar Association has supported legislation focusing on eliminating the death penalty based on either the race of the victim or the race of the offender. In congressional hearings held on February 22, 1994, Professor Randolph N. Stone, Chairperson of the ABA's Criminal Justice Section stated that the policy of the ABA was to support "enactment of federal and state legislation which strives to eliminate any racial consideration in capital sentencing." *Hearings on H.R. 3315 and 3355 Before the Subcomm. on Crime and Crim. Justice, House Jud. Comm., available in* 1994 WL 14168864, at *3. *See* A.B.A. House of Delegates Report No. 109 (Annual Meeting 1988) 35.T.

241. During a Capital Hill hearing concerning habeas corpus, Ronald S. Matthias, Deputy Attorney General of California, suggested that the existence of unexplained racial impact on capital sentencing does not suggest that one should "assume, in the absence of proof, that the 'criminal justice system values victims differently' based on their race and that

of racial discrimination in the criminal justice system through the centuries has left a stain on the entire capital sentencing process. The specter of racial prejudice intrudes on efforts to institute a systematic and neutral death penalty.

Can we be sure that juries do not impose death based on their own personal bias or prejudices?[242] As long as victim impact plays a role in capital sentencing, comparison of the victim to the defendant by jurors is inevitable. Jurors will use their personal views and experiences to make such comparisons. If the statistics indicating racial disparity reflect subconscious racism in the sentencing process, there is no reason to expect that such factors it will not continue. It will remain difficult to determine when and how racial considerations have intruded on the capital sentencing process.[243]

One group of commentators, led by the well-regarded expert on racial discrimination in capital sentencing, Professor David Baldus,[244] has suggested that it may be possible to eliminate racial discrimination in capital sentencing.[245] They argue that "[w]ith proper procedures and firm enforcement of proscriptions against racial discrimination . . . capital sentencing systems can be largely purged of the discrimination that currently

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a murderer whose victim is white will *for that reason* be punished more severely than a victim whose murderer is a person of color." *Habeas Corpus: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103rd Cong. 531 (1994) (statement of Ronald S. Mathias, Deputy Attorney General of California).

242. Recent public attention brought to the jury process by the sensational O.J. Simpson murder case suggests that, like it or not, race influences our attitudes about the justice system. One pollster noted that "[o]n almost every issue, blacks and whites are nearly mirror images of one another—on Simpson's innocence, police conduct, and the jury's efforts." Betty Streisand et al., *The Verdict's Aftermath*, U.S. NEWS AND WORLD REPORT Oct. 16, 1995, at 34. Simpson was acquitted by a majority black jury for the killing of his ex-wife and a friend. Another poll taken after the case suggested that 36 percent of whites believed that black jurors are more likely to convict a defendant who is white and 59 percent of black jurors and 40 percent of white jurors believed white jurors are more likely to convict a defendant if he is black. Joe Urschel, Poll: *A Nation More Divided*, USA TODAY, Oct. 9, 1995, at 5A.

243. In the early years of our country's history, the system of criminal justice in capital cases for blacks, both free and slave, was meager at best. In South Carolina, for example, blacks had no right to a trial by jury and no right to appeal a capital offense prior to 1833. *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 180 (1978). Such examples of inequality in process at the foundation of our legal system, while not dispositive, cannot be ignored.

244. David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994).

245. *Id.* at 359-63.

exists."[246] The absence of substantial legislative action in this area, it is suggested, "enable judges and legislators to avoid difficult choices."[247] It is further explained by the writers that by failing to take steps to eliminate discrimination in capital sentencing, states avoid recognition of the legitimacy of claims of racial discrimination in individual cases and thus avoid the "additional cost, complexity and delay"[248] of permitting such claim to be established. "Thus, acceptance of claims of impossibility and inevitability avoids the necessity to confront a variety of unpalatable issues. Acceptance of these claims also avoids responsibility for the existing state of affairs and justifies the status quo."[249]

Assuming that Professor Baldus and his colleagues are correct in their assertion that discrimination in capital sentencing may be eliminated or dramatically reduced, the question of what procedures might realistically be implemented remains. Dramatic legislative reform of capital punishment statutes to take into account specific racial discrimination challenges is highly unlikely.[250] Abolition of capital punishment is an even more remote prospect.[251] Thus, we are left with the current system, unable to justify or explain the "staggering" racial discrimination statistics and victim-based preference that it seems to encourage. Indeed, even the most recent collection of statistical evidence suggests that the problem has not changed. A general accounting office report on the death penalty reviewed 28 empirical studies of the death penalty and discovered in 82 percent of them, "race of [the]

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246. *Id.* at 359. Some scholars have rejected the view that racism can be eliminated from our society and thus, cannot be eliminated from jury decisions to impose capital punishment. Professor Derrick Bell writes that "Black people will never gain full equality in this country. Even those Herculean efforts we hail as successful will produce no more than temporary 'peaks of progress.'" DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).

247. Baldus, *supra* note 244, at 417.

248. *Id.* at 362.

249. *Id.* at 363.

250. *Id.* at 418. The only federal legislative response to the problem of racial discrimination in capital sentencing is a provision that requires that the judge instruct the jury that in considering whether death is justified "it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim." 18 U.S.C.A. § 3593(f). If the jury finds "death," each member must sign a certificate that race nor any of the other prohibited matters entered into their decision. *Id.* A particular capital defendant may not believe that this section offers sufficient protection against discrimination and may still elect a judge sentencing. This provision appears to adopt the policy endorsed by the American Bar Association. *See supra* note 240.

251. *See supra* note 139, citing the growing popularity of capital punishment.

victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[252]

VII. THE CASE FOR PRETRIAL DISCLOSURE: JURY OR NO JURY? THAT IS THE QUESTION

The demand for victim participation in the sentencing process has been overwhelming. The political process has recognized their cause and has passed legislation to advance the goals of the victim's rights movement.[253] The Supreme Court responded by overruling *Booth* in order to remove a substantial constitutional impediment to victim participation in capital sentencing.[254]

What remains is the question of whether the legislatures or courts will respond to the serious concerns left unaddressed by *Payne* regarding how our justice system should manage victim impact information in capital jury sentencing.

I propose that a rather complete disclosure of victim impact testimony be made pre-trial. Such disclosure should include notification of how many persons wish to provide information, the contents of their statement, and whether their statement would be offered in oral or written form.[255] This disclosure should be made very early in the capital sentencing process.

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252. U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISCRIMINATION 5 (1990).

253. *See supra* note 137.

254. *See* discussion notes 54-85.

255. I would propose the following statutory scheme to make the use of victim impact evidence more predictable.

(A) If a prosecutor has filed a notice to seek the death penalty in accordance with state law he shall, in compliance with this subsection, file a notice of intent to introduce victim impact testimony at least 30 days prior to the time that defendant is required to make his election of a fact finder in the case. Such notice shall set out in reasonable detail a list of potential witnesses expected to offer victim impact testimony and provide a written summary of the proposed testimony of each potential witness.

(B) A notice of intent to present impact testimony shall with reasonable specificity:

(i) identify the name, address and relationship of the proposed witness to the victim.

(ii) briefly summarize the testimony the witness intends to present regarding the economic and emotional harm they have suffered as a result of the crime.

(a) If the surviving victim is a minor, a parent or guardian may assist the prosecutor with providing the disclosure under this subsection.

Pre-trial disclosure is the only viable solution to the major problems that the use of victim impact in capital sentencing creates. I offer this proposal on the assumption that in cases where the victim impact information is extremely emotional and extensive, the most important decision the defendant can make is whether he wants a lay jury to decide the question of death at all.[256] Some information intended to be offered by the victim could be so volatile that a defendant would rather take his chances with a trained

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(iii) State which surviving victims intend to present oral testimony in open court and which will submit a written statement to the jury, or both.

(a) If the prosecutor intends to read a victim impact statement on behalf of the victims, such an intention should be made at the time of the notice referred to in this subsection.

(b) If the prosecutor intends to offer victim impact testimony through a representative family member or surviving victim, such an intervention should be made at the time of the notice referred to in this subsection.

(c) A victim impact statement shall not be presented to the jury unless the prosecutor has complied with the notice provisions of this subsection.

(C) Prior to the time for filing a disclosure, a prosecutor may make a motion for a protective order or a postponement to provide disclosure for good cause shown. Any such motion shall be conducted at a time sufficient to provide the defendant 30 days prior to his election of the factfinder.

(D) After the prosecution's disclosure, the defendant shall file a notice of intention to object to the proposed victim impact testimony and with reasonable specificity state which portions of the proposed victim impact testimony that the defendant intends to object, and offer concise reasons for that objection.

(E) If a motion to object to victim impact testimony is filed by the defendant, the judge shall set a hearing prior to defendant's election of a sentencer and rule on the defendant's objections. Any grounds for defendant's objections to victim impact testimony that are not made prior to trial pursuant to this subsection shall only be entertained by the trial court in its discretion and for good cause shown. Defense counsel shall be required to renew his objections to the victim impact testimony out of the presence of the jury at the time of the sentencing hearing or such objections will be deemed to be waived.

256. As noted earlier, most states do provide for an option of jury or judge sentencing. *See supra* note 5. However, the problem of electing a factfinder may become more complicated in those states which require that once a defendant elects a judge for guilt or innocence he may not request a jury for sentencing purpose only. *See* Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 102-19 (1980) (article noting that Colorado, Georgia, Kentucky, Missouri, Nevada, New Mexico, Oklahoma, South Carolina, South Dakota, Utah and Wyoming provide that a waiver of a jury trial on guilt or innocence constitutes a waiver of a jury sentencing).

professional jurist.[257] It is doubtful that a defendant could make a knowing and intelligent election of a factfinder without knowledge of the most potentially damaging information to be offered against him.[258]

Although the Supreme Court has recognized the right to some Due Process protection in criminal sentencing in the area of discovery,[259] it has never gone so far as to create a right to discovery prior to jury selection in order to assist a defendant in the sentencing phase of a capital case. The Supreme Court has recognized, however, that the unique character of death as punishment makes it different and thus different rules may be required in order to advance the goal of fair sentencing.[260] The need for early pretrial disclosure emanates from the confusion caused by the fact that victim impact information does not have a clear position in most capital punishment schemes.

Most states that have capital punishment utilize a process of weighing and balancing aggravating circumstances against mitigating circumstances in

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257. It has long been suggested that a "judges' repeated experience with criminal cases will often fit him better to deal fairly and scientifically with convicted defendants than an ordinary jury." LESTER B. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 537 (1947). *See also* State v. Gulbrandson, 906 P.2d 579 (Ariz. 1995) (judges are capable of not focusing on irrelevant testimony in a victim impact statement); State v. Williams, 904 P.2d 437 (Ariz. 1995) (absent evidence to the contrary a trial judge in a capital case is capable of focusing on relevant sentencing factors and setting aside the irrelevant, inflammatory and emotional factors); State v. Bolton, 896 P.2d 830 (Ariz. 1995) (victim's testimony not relevant to sentencing factors was improper but trial court was presumed not to have considered it); State v. Fautenberry, 650 N.E.2d 878, 882 (Ohio 1995) (three-judge panel was presumed not to consider remarks regarding victims' recommendation of sentence).

258. The Supreme Court has recognized that important decisions, such as waiving rights or exercising choices, should be made with "the express and intelligent consent of the defendant." Patton v. United States, 281 U.S. 276, 312 (1930). It would be impossible to make a reasonably intelligent choice while exercising the right without sufficient information about what the prosecution intends to present.

259. *See supra* notes 182-89. The Supreme Court has recognized that due process does require time allowed to receive information and prepare for an issue in a capital sentencing hearing, however, the Court has never issued a discovery ruling requiring that a defendant be given information which is designed to help him select a jury or elect his factfinder prior to a death penalty case.

260. *See* California v. Ramos, 463 U.S. 992, 998-99 (1983) (Supreme Court recognized that "the qualitative difference of death from all other punishment requires a correspondingly greater degree of scrutiny by capital sentencing determinations"). It is, however, ironic that in the area of civil litigation reform, the bench and bar have recently moved to a position that endorses open discovery. *See* FED. R. CIV. P. 26(a) (provides for mandatory prediscovery disclosure in civil cases).

order to determine if death is an appropriate sentence.[261] In most statutes, victim impact is not an aggravating circumstance and accordingly does not require that pretrial disclosure be provided to the defendant.[262] The recently enacted federal death penalty law's victim impact provisions make early notice to the defendant by the prosecutor only optional.[263] The fact that the jurors do not know how victim impact fits into the sentencing scheme may lead to arbitrary results.[264]

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261. For an excellent article describing the variety of weighing and balancing statutes across the country, see James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 CRIM. L. BULL. 19-60 (1995).

262. Several courts have recently addressed the question of whether victim impact is an aggravating circumstance or even has an aggravating effect on a death sentence. Many of the courts examining the issue have reached the conclusion that it does not. *See* State v. Williams, 904 P.2d 437, 453 (Ariz. 1995) (court found that victim impact is not an aggravating circumstance); *see also* State v. Greenway, 823 P.2d 22, 30 (Ariz. 1991) (court held victim impact not to be an aggravating circumstance); Windom v. State, 656 So. 2d 432, 438 (Fla. 1995) (court found that victim impact is not a nonstatutory aggravating circumstance). It may be that many statutes do not list "'victim impact' as an aggravating factor" but it cannot be questioned that it is offered to assist the jury in determining that death is an appropriate sentence.

263. The recently enacted federal death penalty law makes provisions for consideration of victim impact in determining whether seeking the death penalty is appropriate. This law provides that as part of mandatory notice to the defendant, the government may include factors concerning the effect of the crime on the victim and the victim's family. 18 U.S.C.A. § 3593(a)(2) (West 1996). However, the statute does not list victim impact as an aggravating factor, but merely as a "factor." This may present constitutional problems when a jury attempts to "factor" the victim's value into its deliberation. *See infra* note 264. Furthermore, even if the government exercises its option to provide notice of victim impact before trial, the statute does not make it clear how much detail is required or whether there is a sanction for failing to provide such notice.

264. In *Mills v. Maryland*, 486 U.S. 367, 368 (1988), the Supreme Court recognized that potential jury confusion might be a basis upon which to invalidate a capital sentence.

The Supreme Court has stated that "in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment." Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). *See* also Sochor v. Florida, 504 U.S. 527, 532 (1992); Stringer v. Black, 503 U.S. 222, 231 (1992); Parker v. Dugger, 498 U.S. 308, 315 (1991); Clemons v. Mississippi, 494 U.S. 738, 752 (1990). The Supreme Court explained:

> [t]here is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," by placing a "thumb [on] death's side of the scale," thus "creating the risk [of] treating the defendant as more deserving of the death penalty," Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a

If victim impact is not an aggravating circumstance, what do you balance it against? Certainly it is not a mitigating circumstance so it must have some characteristics of an aggravating circumstance since it is offered by the prosecution to support its demand for a death sentence. The current system that makes it unclear how victim impact is to be considered could theoretically permit a sentencing jury to determine that victim impact might be sufficient to outweigh all mitigating factors when combined with any other aggravating factor proven under a given statute. Since the law does not make clear how victim impact is to be weighed or by what standard of proof it should be measured, it becomes an arbitrary "wild card" in the capital punishment scheme. Its aggravating effect may never be revealed because its absence as an aggravating factor on the jury verdict sheet provides no clue as to how it assisted the jurors in outweighing the mitigating circumstances.

In a case where highly emotional victim impact testimony may be offered, jurors may believe that they could find it aggravating and thereafter give whatever weight deemed necessary until the balance equaled "death." The fact that it is unclear how it should be considered may lead a defendant to avoid the risks of juror confusion altogether by avoiding a jury sentencing. The serious problems a defense attorney may encounter when attempting to cross-examine a victim or otherwise challenge the veracity of their character or suffering[265] may further reinforce the conclusion that a judge sentencing would more desirable.[266]

Pre-trial disclosure advances the goal of an orderly death penalty by integrating the victim impact information into a predictable pre-trial procedure in much the same way such hearings are used in most jurisdictions with suppression motions or motions in limine held pre-trial.[267] Questions of

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defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."

Sochor, 504 U.S. at 527, 532 (citations omitted).

265. *See* discussion *supra* Section V, on confrontation.

266. In one Maryland capital case that involved a felony murder and highly emotional victim impact testimony, three separate juries rendered a death sentence. Harris v. State, 539 A.2d 637 (1988). After the fourth remand, the defendant requested a court sentencing and received a life sentence. *Id.* It may have been that the victim impact testimony was too damaging for any jury to consider a life sentence.

267. The motion in limine, which is a device used to deal with potentially prejudicial matters at pretrial and out of the presence of the jury, has become an accepted mechanism to assure the accused's Sixth and Fourteenth Amendment right to a fair trial. *See* Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1274-81 (1987) (presenting a cogent discussion of the history and development of the motion in limine).

relevance and the scope of the victim impact information can be examined by the judge exercising appropriate discretion as to what will be introduced at a sentencing hearing long before the jury is empaneled.[268]

In those extremely rare instances when a defendant may want to challenge the validity of the victim impact information, pre-trial disclosure will provide adequate time to investigate and prepare challenges to the victims' testimony. Any attorney preparing a case obviously cannot confront testimony without adequate investigation.[269]

Pre-trial disclosure facilitates the defendant's preparation of mitigation so that he may respond to the adverse effects of victim impact testimony,[270] since victim impact testimony is likely to have an aggravating effect on the jury.[271] Pre-trial disclosure helps eliminate the prosecutor's strategic advantage in controlling the use and timing of victim impact testimony at trial.[272]

The early disclosure of victim impact testimony facilitates the process of capital jury selection by providing the defendant with information about what the jury will hear if they find the defendant eligible for death.[273]

The assistance of the victim impact information in jury selection is particularly important, considering the limitations recently placed on the defendant in exercising peremptory challenges in fashioning the jury that

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268. Procedure should permit election after the defendant finds out what victim impact is being presented as evidence.

269. Failure to engage in proper pre-trial investigation by defense counsel has been held to be a violation of a defendant's Sixth Amendment right to effective assistance of counsel and of the Fourteenth Amendment's Due Process provisions. *See* Kimmelmon v. Morrison, 477 U.S. 365, 366 (1986); Sullivan v. Fairman, 819 F.2d 1382, 1391-93 (7th Cir. 1987) (failure to contact witnesses who would have contradicted government witness). Complete failure to investigate does not necessarily lead to reversal. *See* Burger v. Kemp, 483 U.S. 776, 777 (1987); Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986) (failure to investigate was not prejudicial error); Ballou v. Booker, 777 F.2d 910, 914 (4th Cir. 1985) (defense counsel's failure to interview rape victim or physician did not constitute ineffective assistance of counsel); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) (counsel's admission that he was unprepared and his failure to investigate state's witnesses were unreasonable performances but not prejudicial).

270. Coyne, *supra* note 207.

271. This seems obvious since the tragedy of the victim's loss told to a sentencing jury is certainly not mitigating evidence.

272. Most statutes that govern the use of victim impact are silent as to at what stage of the proceeding it may be offered.

273. Since in most capital cases the same jury will consider guilt and punishment, a defendant may have to select a jury as much for its consideration of possible punishment as for any other factor.

will decide his fate. No longer can a defendant challenge on the basis of the prospective jurors' race or gender in an effort to shape the outcome of his trial.[274] This alone may be sufficient reason to make a jury trial less desirable. Thus, pretrial disclosure will permit the defendant to either elect no jury or select a jury he believes to be fair.[275] Add to the equation the long-held concerns that capital juries are already "conviction prone" by the manner in which they are selected,[276] and a jury sentencing without full use of peremptory challenges may become less desirable.

Policy reasons for pre-trial disclosure should not favor only the defendant. There are several advantages of pre-trial disclosure that benefit the victims as well. First, pre-trial disclosure facilitates the effective assistance of counsel[277] preparing a capital case. Enhancing preparation of defense counsel reduces the prospect of appellate reversal of a death sentence and reduces many potential areas of collateral attack.[278] This will result in

274. The doctrine first announced in *Batson v. Kentucky*, 476 U.S. 79 (1986), permitting a defense counsel to object to a prosecutor's use of peremptory challenges in a discriminatory manner was recently extended to defense counsel permitting prosecutors to object to their challenges as well. *See also* Georgia v. McCollum, 505 U.S. 42 (1992). Two terms later, the Supreme Court extended its prohibition to peremptory challenges based on the juror's gender. J.E.B. v. Alabama, 114 S. Ct. 1419 (1994). These new prohibitions dramatically change the strategic tools that an attorney may use to shape a capital defendant's jury and obtain a jury he believes to be more favorably disposed to the defendant's case.

275. Jury selection in capital cases requires consideration of many intangible factors like sociological data, psychological expertise, skillful questioning and intuition. CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE & CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, CALIFORNIA DEATH PENALTY DEFENSE MANUAL vol. II, p. 11-25. A defendant, after being advised of the potential inaccuracy of jury selection might choose a judge.

276. Although the Supreme Court has held that a capital jury which has been selected after all persons who have "scruples" against imposing death have been excluded is not unconstitutionally "conviction prone," *see* Lockhart v. McCree, 476 U.S. 162 (1986), some studies have indicated that such juries are more likely to convict. Walter E. Oberer, *Does Disqualification of Jurors for Scruples against Capital Punishment Constitute Denial of a Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545 (1961). A competent defense attorney may take such a factor into account when determining with his client the type of sentence that is most desirable.

277. *See supra* note 269 and accompanying text.

278. The American Bar Association has stated concerns that effective counsel should be provided very early in the capital sentencing process. *See* AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (1990); *see also* Guideline 11.2, AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) ("Counsel in death penalty cases should be required to perform in the specialized practice of capital representation zealously committed to the capital case who has adequate time and recourses for preparation."). Some courts have rejected the notion that capital cases require a more

fewer reversals on appeal and a shorter time period between the imposition of a death sentence and the actual execution.[279] The Court in *Payne* specifically reserved the possibility that some victim impact could violate due process.[280] Pre-trial disclosure will give judges the opportunity to make crucial decisions in a more controlled atmosphere.[281]

Pre-trial disclosure will permit the judge to accommodate the special needs of victims who are going to testify in open court. This would include consideration of their special sensitivities and physical needs. Such hearings may lead to some victims, with the agreement of counsel, videotaping their presentations to avoid interruptions because of emotional breakdowns.[282]

Finally, early disclosure supports victim participation in a way that is consistent with the goal of facilitating the emotional healing process.[283]

Pre-trial disclosure will provide a way for the judge to prevent manipulation and abuse of victims by the prosecution[284] and harassment by the defense.[285] No party in the system should be permitted to exploit a

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stringent test for competency of counsel. *See* State v. Davis, 116 N.J. 341, 352, 561 A.2d 1082, 1089 (1989).

The reversal rate of capital cases on appeal has been reported as high as 46.3 percent. *See* David A. Kaplan, *Death Mill, USA*, NAT'L L.J., May 8, 1989, at 38.

279. Public disillusionment over delay and the high number of reversals have generated negative attitudes from the public concerning the criminal justice system. GOVERNOR'S COMMISSION REPORT, *supra* note 220, at 161. *See infra* note 289.

280. Payne v. Tennessee, 501 U.S. 808 (1991). *See* Levy, *supra* note 163.

281. It seems sensible that a judge may more easily control the atmosphere of a courtroom if he has some idea how witnesses who intend to offer emotionally charged testimony may react.

282. A judge taking oral victim impact testimony out of the presence of the jury pre-trial would be able to prepare to accommodate a victim that was physically impaired or demonstrated particularly strong emotional sensitivity while testifying. The judge may even feel compelled to preclude live oral testimony if the victim was unable to maintain their composure or became prejudicially emotional.

283. *See supra* note 149 and accompanying text.

284. Some troubling ethical issues may well arise as a result of the prosecutor's effort to secure a conviction and death sentence with the aid of victim impact testimony. "For example, how actively should a prosecutor seek the aid of grieving friends and family members in attempting to secure a death sentence?" RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 302 (1994). Pretrial disclosure may limit intentional family manipulation by requiring the prosecution to put its cards "face up" on the table. Pre-trial disclosure also permits questioning of victim in the protective atmosphere of the courtroom in a controlled pre-trial setting.

285. Victims of capital homicide have complained that defense counsel often subpoena family members of the deceased as potential witnesses "with no intention of calling them to testify, simply to keep them out of the site of the jury." Brooks Douglass, *Oklahoma's*

victim for strategic advantage. Controlled management of victim impact information is consistent with the goals of fair and non-arbitrary capital sentencing.[286]

If our system intends to do more than simply pay "lip service" to orderly capital sentencing the advantages of pre-trial disclosure is a modest and realistic proposal.

VII. CONCLUSION

There is no doubt that victim participation in capital sentencing is here to stay. All indications point to the overwhelming public support for capital punishment. The fact that capital punishment is politically popular, however, should not prevent reforms that make the system less arbitrary. Victim impact testimony is, in many cases, the most important factor in whether a capital defendant will receive the ultimate punishment.

Moral,[287] philosophical,[288] economic,[289] and religious[290] arguments have been raised against capital punishment over the last several decades.

Victim Impact Legislation: A New Voice for Victims and Their Families, 46 OKLA. L. REV. 283, 287 (1993).

286. The Supreme Court has made it clear that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988).

287. One moral perspective on capital punishment is that the state may only take a life in order to

> protect its citizenry from the imminent danger of criminal action and in actual resistance to felonious attempts "including attempts forcibly to avoid arrest or escape custody." Once, however, the prisoner has been apprehended . . . the right of the State to take his life as punishment, retribution, revenge or retaliation . . . does not exist in moral law.

Donald E.J. MacNamara, *The Case Against Capital Punishment, Social Action*, April 1996, at 4-15, *reprinted in Statement Against Capital Punishment*, THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 184 (Hugo Adam Bedau ed., 1964).

288. Some writers have suggested that capital punishment is an unacceptable contradiction to the intrinsic worth of a human being. *See* L.S. Tao, *Beyond* Furman v. Georgia*: The Need for A Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAWYER 722 (1976).

289. Some studies of the cost of a capital case through appeal have calculated costs as high as $1.8 million. NEW YORK DEFENDER'S ASSOCIATION, INC., CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE 26 (1982). More conservative estimates have been projected. A recent Maryland study estimated that a fully litigated capital case required expenditures of about $400,000. GOVERNOR'S COMMISSION REPORT, *supra* note 220, at 193. That study characterized the estimates for capital cases over $1.5 million as "excessive." *Id.*

Despite its critics in this country and its abolition in the overwhelming majority of western societies,[291] the United States has been steadfast in its support for capital punishment;[292] recently, the popularity of the death penalty has even caused a resurrection of capital punishment in places where it had been dormant.[293] The most recent example of this resurgence is the revival of the death penalty in the State of New York.[294]

Few issues are more politically charged than that of support for the death penalty. This is due to the perceived failure of the criminal justice system to give victims voice, support, and even vengeance as part of their role in the sentencing process. This perception has encouraged many political efforts by victims to pursue greater direct influence on the system. While victims gain greater rights[295] and the courts relax impediments to their participation, elected officials emphasize the changing climate as part of their routine political discourse.[296] Not long ago, the newly-elected governor of New York State, George E. Pataki, who ran an election campaign promising to revive capital punishment, kept his promise by signing a death penalty bill into law as one of his first political acts. He emphasized his support for

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290. From the 1950's through the 1980's, several religious organizations issued official resolutions against capital punishment. Among those churches were: the American Baptist Church, the American Jewish Committee, American Lutheran Church, the Episcopal Church, American Friends Services Committee, the Mennonite Church, the Presbyterian Church, United Church of Christ, United Methodist Church, and the United States Catholic Conference. CAPITAL PUNISHMENT: WHAT THE RELIGIOUS COMMUNITY SAYS, NATIONAL INTERRELIGIOUS TASK FORCE ON CRIMINAL JUSTICE (1980).

291. It has recently been noted that, "[o]f all the countries we resemble in our values and political system, none has capital punishment. All of Western Europe, Canada, Australia, New Zealand, most of Latin America and even some former Communist nations of Eastern Europe have abolished it." JACK GREENBERG, CRUSADERS IN THE COURTS 456 (1994).

292. The United States joins China, Iran, Iraq and Syria as the largest executors in the world. *Id. See also supra* note 139 (statistic supporting the popularity of capital punishment).

293. Canada has recently discussed reviving capital punishment citing polls that reflect as much as 69 percent popular support the return of a death penalty. *See* Doug Fischer, *Poll Finds Overwhelming Support for Return of Death Penalty*, MONTREAL GAZETTE, July 10, 1995, at A5; David Crary, *Canadians Clamor for Death Penalty*, DAYTON DAILY NEWS, July 11, 1995, at 8A.

294. N.Y. CRIM. PROC. § 400.27 (setting out procedures for determining sentence of death for first degree murder, effective Sept. 1, 1995).

295. *See supra* notes 119 and 112.

296. Former President George Bush discussed the *Payne* case as part of his presentation remarks at the National Crime Victims' Rights Awards on April 24, 1992. *See* Levy, *supra* note 163, at 1029 n.19.

victims by signing the bill using the pens of two slain police officers.[297] His predecessor, Mario Cuomo, a twelve-year incumbent who consistently vetoed death penalty legislation, commented that the new law resulted from "fear, anger, short sightedness and some cynicism coming together to overwhelm intelligence . . . . It's more than just sad, it's frightening."[298] These statements demonstrate that capital punishment is still an explosive and divisive issue in America.

Whether the reasons the death penalty maintains general strong support from public fear, anger or cynicism as former Governor Cuomo suggests, the penalty appears to be permanent. With the Supreme Court's decision in *Payne* signaling the willingness of the Court to permit the political process to grant greater victim participation, it is highly unlikely that state or federal legislators will be eager to suggest victim participation be limited.[299]

It is clear that as a society we have not examined the real consequences of the *Payne* decision and our very conscious legislative choice to open the death penalty process up to emotional and grief-ridden victims who have an understandable desire to participate, but who also have an unpredictable influence over the sentencing juries.[300] Will their testimony lead to the valuing of some lives and some victims over others? Will racial disparities related to white victims of African-American defendants ever be removed from the process?[301] Will we ever be able to explain to a sentencing jury how they should consider the victim impact information in relationship to the circumstances of the defendant or his crime? These and other questions may never be answered. In the interim, however, people are being sentenced to death in an atmosphere of confusion and uncertainty.

If this country must continue its long-standing pursuit of the perfect death penalty, it should at least meet minimal standards of fundamental fairness.[302] It makes no sense to go through the trouble of creating elaborate

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297. Associated Press, *Pataki signs N.Y. death penalty into law with pens of slain officers*, BALTIMORE SUN, Mar. 8, 1995, at 16A.

298. *Id.*

299. Recent legislative activity that has led to several statutes and constitutional amendments to advance victim's rights suggests that political support is still formidable.

300. *See* K. Elizabeth Whitehead, Note, *Mourning Becomes Electric:* Payne v. Tennessee's *Allowance of Victim Impact Statements During Capital Sentencing Proceedings*, 45 ARK. L. REV. 531, 552 (1992) (permitting victim impact statements leave courtrooms open to "theatrics" before the sentencing juries).

301. *See supra* notes 244-52.

302. "It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

capital punishment statutory schemes to protect the integrity of the process and then fail to provide adequate procedural safeguards for the most important and potentially volatile evidence that is likely to be presented in support of a convicted murderer's possible execution.[303]

In the recent aftermath of the O.J. Simpson trial, it has also been demonstrated that the perceptions of the justice system among whites and blacks differs.[304] Although this fact has been examined and discussed prior to the recent popular opinion polls that have accompanied the O.J. Simpson case,[305] defense lawyers and capital defendants may now, more than ever, have to consider the possible risks of opting for a jury sentencing since racial and gender-based exclusion in jury selection has been legally prohibited.[306]

With victim participation increasing, a capital defendant's well-informed election between a judge or a jury may be the only realistic protection that can be added to the capital punishment scheme in a country more willing than ever to exercise the public's desire for more executions.[307] At a minimum, the addition of extensive pre-trial disclosure of victim impact information is consistent with a death penalty process that at least superficially attempts to respect both defendants and victims in the most serious decision that any criminal justice system can endorse.

The specter of racism and the potential inflammatory emotional content of victim impact information requires that we treat victims and their testimony with great care. Victims demand participation, but the integrity of our judicial process requires that we do not totally lose control of the capital punishment process to the forces of emotion, retribution, or political whim. We must protect the valued option of jury sentencing for those capital defendants who may choose juries. We must also facilitate the legitimate concerns of a defendant to receive a fair sentencing trial and not permit the

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303. *See* Whitehead, *supra* note 300, at 548-49.

304. *See* George Anastaplo, *On Crime, Criminal Lawyers, and O.J. Simpson: Plato's Gorgias Revisited*, 26 LOY. CHI. L.J. 455, 466 n.26 (1995) (citing the differences in racial attitudes between blacks and whites regarding Simpson's guilt reveal "the deep seated reservations that African-Americans have about the criminal justice system in the United States").

305. In his classic work on the racial problem in America during the late 19th and early 20th century, Gunnar Myrdal noted that a legislative case can be made to establish that both crime statistics and results in criminal courts are affected by discrimination in the application of the criminal law. Thus, it is not surprising that attitudes toward the justice system are effected by pervasive discrimination. *See* GUNNAR MYRDAL ET AL., AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 966-76 (1962).

306. *See supra* notes 274 and 275.

307. *See supra* note 139.

victim to become the entire focus of a capital case. The goal should remain that a sentence of death should be based primarily on "the character of the individual and the circumstances of the crime."[308]

Society may demand that the punishment fit the victim and the law may be moving toward accomplishing that result, but such a trend should not permit a trial by "victim impact surprise." At a minimum, a capital defendant should be given the raw materials necessary to make an informed decision about who will judge whether he should die at a time when the information will have some value to him. To do any less is inconsistent with the goal of maintaining a fair capital sentencing process.

308. Zant v. Stephens, 462 U.S. 862, 879 (1983).